No. 85- 65

Supreme Court, U.S.
FILED
JUL 12 1985
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1985

SHANGHAI POWER COMPANY,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Is there a Fifth Amendment taking of private property when the United States, in furtherance of its foreign policy goals, extinguishes its national's valid claim against a foreign government for less than its full value?

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* Pursuant to Rule 28.1 of the Supreme Court the following are the parents, non-wholly-owned subsidiaries and affiliates of Shanghai Power Company: Boise Cascade Corporation; Cuban Electric Company; Western District Power Company of Shanghai Federal Inc. U.S.A.; Far East Power Corporation.

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October Term, 1985

SHANGHAI POWER COMPANY,

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vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Shanghai Power Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on February 13, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Claims Court's grant of summary judgment in favor of the Government is printed in the Appendix (1a-3a). The opinion of the Claims Court is reported at 4 Cl. Ct. 237 (1983) (5a-30a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1985 (1a-3a). Timely petitions for rehearing and rehearing in banc were denied on April 16, 1985 (4a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND EXECUTIVE AGREEMENT INVOLVED

This case involves the Just Compensation Clause of the Fifth Amendment to the United States Constitution:

> [N]or shall private property be taken for public use, without just compensation.

Petitioner maintains that its private property was taken by the Agreement Between the Government of the United States of America and the People's Republic of China Concerning the Settlement of Claims, May 11, 1979, 30 U.S.T. 1957, T.I.A.S. No. 9306 ("Executive Agreement") (32a-35a).

STATEMENT OF THE CASE

Introduction

As a result of the confiscation of its properties by the People's Republic of China ("PRC"), petitioner Shanghai Power Company ("SPC") had a valid claim, as certified by the Foreign Claims Settlement Commission of the United States ("FCSC"), for over $144 million against the PRC. On May 11, 1979, the United States Government signed the Executive Agreement extinguishing SPC's claim. Under the Executive Agreement, the PRC promised to pay $80.5 million in settlement of all claims of American nationals

against the PRC. This amount, which corresponded to the estimated value of blocked Chinese assets in the United States that were released under the Executive Agreement, was to be paid over a period of five years and distributed to the American claimants with the result that a claimant such as SPC would recover approximately 14% of its certified claim.

This Court, in applying the Fifth Amendment to a wide variety of cases, has consistently held that the complete destruction of private property by the Government for a public purpose is a taking for which full compensation must be paid. The issue presented here is whether the Court of Appeals erred in failing to apply this principle to the Government's extinguishment of an American national's claim against a foreign government.

Background

In 1950 SPC, a Delaware corporation, owned and operated the largest electric public utility system in China, which it had acquired in 1929. After Chinese assets in the United States were blocked by our Government on December 16, 1950, the Communist Chinese authorities retaliated on December 28, 1950 by seizing SPC's properties along with other American-owned assets in China.

Although the franchise agreement under which SPC operated in China contained an arbitration clause that entitled SPC to submit any claim relating to an expropriation of its properties to international arbitration, the U.S. Government's 1950 blocking regulations barred SPC from invoking the arbitration clause.[1]

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1. Under the Treasury Department's foreign assets control regulations (31 C.F.R. §§ 500.302, 500.305) SPC was blocked because its principal place of business on December 17, 1950 was in mainland China. The blocking order

(Cont'd)

In 1966 Congress enacted the China Claims Act, 22 U.S.C. §§ 1643-1643k, which directed the FCSC to adjudicate under international law the amount and validity of U.S. nationals' claims against the PRC arising from its expropriations subsequent to 1949. The principal purpose of the act was to make information available to the Government that would enable it to negotiate a settlement with the PRC that would accuratedly reflect the value of the American claims. Ather thorough review, the FCSC determined in 1970 that SPC had a valid claim against the PRC for $53,832,855 plus interest at 6% per annum from December 28, 1950 to the date of payment. SPC's claim amounted to more than 25% of the total American claims against the PRC and was the single largest claim.

In 1971, the Nixon administration initiated the "opening to China" which culminated in the normalization of relations between the United States and the PRC by the Carter administration in 1979. The accommodation with the PRC was of extraordinary significance in the advancement of U.S. national security and economic interests, as was emphasized in the statements of senior Government officials. National Security Adviser Zbigniew Brzezinski stressed that "[f]ew actions will contribute more to the security and stability of our important positions around the rim of Asia . . . than a constructive involvement with China . . . . Normalization consolidates a favorable balance of power in the Far East. . . ." 79 Dep't State Bull. 21 (Feb. 1979). Secretary of the Treasury Michael Blumenthal, the chief negotiator of the Executive Agreement, observed: "We can ill-afford to cast a blind

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(Cont'd)

continued in force until January 31, 1980. 45 Fed. Reg. 7224 (1980). SPC was thus prohibited from enforcing its claim against the PRC from the date when the PRC confiscated its properties until the United States had extinguished its claim.

eye to the vast potential for exports provided by the Chinese . . . market. . . ." *Id.* at 17. According to the Executive Agreement that extinguished SPC's claim, the elimination of the American claims was essential "[i]n order to develop bilateral economic and trade relations and to complete the process of normalization of relations" between the United States and China (32a). Thus, the Executive Agreement explicitly proclaims its public purposes, and the statements of key Government officials leave no doubt as to the overriding importance of those purposes to the military security and economic well-being of the United States.

Proceedings Below

On November 6, 1981, SPC filed a petition in the Claims Court alleging that the extinguishment of its claim by the Executive Agreement constituted a taking under the Fifth Amendment. SPC accordingly requested compensation of some $124 million, the difference between the amount of its claim as certified by the FCSC and the partial compensation that it expects to receive from the PRC's payments under the Executive Agreement (5a-6a).[2] The basis for jurisdiction in the Claims Court was 28 U.S.C. § 1491(a)(1).

In a seventeen-page opinion issued on December 30, 1983, the Claims Court assumed that SPC's claim was worth more than the amount that SPC would receive as a result of the Executive Agreement (12a) and held that the claim was property (11a). The

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2. The PRC withheld $2 million from the final payment due under the Executive Agreement citing litigation in the Delaware State courts in which SPC has asserted a counterclaim against the PRC based upon the seizure of its properties. It is not known whether the PRC will eventually pay this $2 million, which has been overdue since October, 1984. Whether this sum is ultimately paid will affect the computation of SPC's damages in this case.

Claims Court nevertheless granted the Government's motion for summary judgment and dismissed SPC's complaint.

The Court of Appeals affirmed the Claims Court on February 13, 1985 in a two-page opinion that also assumed that SPC's claim was worth more than SPC will receive as a result of the Executive Agreement. The court held that the Government's extinguishment of SPC's claim was not a taking because the President had considered the interest of the nation as a whole in exercising his constitutional prerogative to normalize relations with the PRC. It further held that SPC had benefited from the Executive Agreement by receiving a smaller certain sum for a larger contingent one (2a). The Court of Appeals determined that its opinion would not be published or cited as legal precedent because "it does not add significantly to the body of law and is not of widespread legal interest" (1a).

REASONS FOR GRANTING THE WRIT

This case presents a recurring issue that this Court considered but did not find ripe for decision as recently as 1981. In describing that issue the Court in *Dames & Moore v. Regan,* 453 U.S. 654, 659 (1981), stated that "[t]he questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed." While the Court affirmed that the President had the power to enter into the 1981 Algiers Accords pursuant to which suits in U.S. courts by American claimants against Iran were suspended, it deferred decision of whether "the President's actions may effect a taking of petitioner's property." *Id.* at 689. The taking issue in *Dames & Moore* was not ripe for review because the claimant's recourse—if its arbitral remedy provided by the Accords proved illusory or inadequate—would be to commence an action in the Claims Court.[3] SPC's petition in this case raises,

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3. The court held that 28 U.S.C. § 1502—the so-called treaty exception to the Claims Court's jurisdiction—does not apply when, as here, the right invoked by the petitioner derives from the Constitution and not from the treaty or executive agreement itself. *See* 453 U.S. at 689-90.

in the context of the Executive Agreement, the important question deferred in *Dames & Moore* concerning whether the exercise of the Government's foreign claims settlement power can constitute a taking under the Fifth Amendment.

As noted in *Dames & Moore*, the United States Government settled the private international claims of its citizens some eighty times between 1817 and 1917, and an additional ten times from 1952 to 1979. 453 U.S. at 679-80. This Court, however, has yet to decide whether the Government may deal with this particular type of private property uninhibited by the Just Compensation Clause of the Fifth Amendment. The *Restatement (Second) of Foreign Relations Law of the United States* (1965) observes that the "question that has not been definitively settled is whether a settlement by the United States for less than the fair value of the claim may constitute a taking of property from the injured party that entitles him to compensation under the Fifth Amendment to the Constitution." *Id.* § 213, Comment a.

The need for definitive resolution of the taking issue has assumed increasing urgency. In the age of absolute sovereign immunity prior to the 1950's, U.S. private claimants often had little recourse other than their government's diplomacy for enforcement of their claims against foreign governments. In addition, U.S. claimants had small reason to request judicial review of claims settlements until the post-World War II era. Data provided in the authoritative treatise on the subject show that the average recovery by the United States in en bloc settlements negotiated between 1794 and 1934 amounted to about 98% of the American losses as evaluated by commissions appointed, as was the FCSC in this case, to perform such evaluations. *See* 3 M. Whiteman, *Damages in International Law,* App. B, Table II (1943).

Today, the Government exhibits a growing willingness to conclude claims settlement agreements that compensate its nationals for only a fraction of their losses. *See, e.g., Annual Report to the Congress of the Foreign Claims Settlement Commission,* Appendix at 6 (1979). At the same time, however, the ability of U.S. citizens to enforce their claims against foreign governments in U.S. courts and foreign forums without the aid of diplomatic intervention has increased dramatically. Enactment of the Foreign Sovereign Immunities Act of 1976 and the entry into force of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards evidence widespread acceptance of the foreign sovereign's amenability to judicial and quasi-judicial jurisdiction. As *Dames & Moore* demonstrates, takings law questions are now likely to arise whenever Government action appears to deprive U.S. claimants of their opportunity to recover the full value of their claims against foreign governments. SPC's petition is further evidence that the taking issue is a recurring one not limited to a particular exercise of the Executive's power to settle claims. The uncertainty that exists as to the law in this area is harmful in that it could encourage the Government to accede to seriously inadequate claims settlements—as with the PRC[4]—in the belief that it owes no duty to provide just compensation for the property sacrificed.

SPC submits that it is time for this question to be resolved and, further, that it should be resolved in a way that will not deprive American claimants against foreign governments of the Fifth Amendment guarantee of just compensation for the

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4. The Comptroller General of the United States said of the Executive Agreement that ". . . the private U.S. claimants will receive something less than 40 cents on the dollar—unadjusted for 30 years' inflation—with no provision for interest . . . . [I]t can also be argued that the settlement should have been much larger." November 14, 1980 Report by the Comptroller General to the Congress of the United States, pp. 62-63.

elimination of their private property by United States Government action.

Finally, consideration by this Court of the question raised by SPC's petition would enable the Court to correct the significant omissions and errors in the opinions of the Claims Court and the Court of Appeals, which are the only lower courts empowered to deal with the issues raised in this case. In seeking to resolve the taking issue the courts below ignored a long line of judicial decisions and scholarly commentary indicating that the Government's bartering away of U.S. nationals' claims against foreign nations is a taking. The issue goes back to this nation's earliest days, and the posture of the courts, which—except for this case—has been strikingly consistent, is exemplified by *Ware v. Hylton,* 3 U.S. (3 Dall.) 199 (1796). There, a debt owing by a citizen of Virginia to a British subject had been extinguished by payment to the Virginia government under an act of its legislature confiscating the indebtedness during the American Revolution. Following the Revolution, the United States revived that debt pursuant to a treaty with Britain, and while this Court upheld the power of the Government to do so, it described the Government's Fifth Amendment liability as follows:

> That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the states, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. This principle is recognized by the constitution which declares, "that private property shall not be taken for public use without just compensation."

Id. at 245 (opinion of Chase, J.).

In 1800, the Government entered into a treaty with France which eliminated the claims of U.S. nationals against that nation, giving rise to the famous French Spoliations cases. There, the Government extinguished the claims of its citizens against France, arising from French depredations of private American shipping during a naval war in the 1790's, in consideration for a release of French governmental claims against the United States arising from the U.S. breach of its 1778 treaties with France. In 1885, Congress requested the Court of Claims to consider claims against the United States of its nationals whose claims against France had been extinguished by the 1800 treaty. Act of January 20, 1885, 23 Stat. 283.[5] The Court of Claims in *Gray v. United States,* 21 Ct. Cl. 340 (1886), clearly stated the principle that such an extinguishment is a taking requiring just compensation. The decision, by John Davis, concluded:

> If "national" claims had been used against "national" claims, . . . no rights between the individual and his own Government could have complicated the situation. But in the negotiation of 1800 we used "individual" claims against "national" claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this . . . is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim

5. The Court of Claims did not acquire jurisdiction over claims against the Government arising out of the Constitution until the enactment in 1887 of the Tucker Act. Act of Mar. 3, 1887, 24 Stat. 505.

> against that country. . . .
>
> It seems to us that this "bargain" . . . by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation.

Id. at 392-93. *Accord,* 27 Op. Att'y Gen. 327, 331 (1909) (citing *Gray* for the rule that "a treaty is supreme law . . . only . . . in so far as it does not conflict with the Constitution, and when private property is taken by treaty it must by compensated for."). *See also Meade v. United States,* 2 Ct. Cl. 224, 225 (1866), *aff'd on other grounds,* 76 U.S. (9 Wall.) 691 (1870) (Government's surrender of private claim against Spain in exchange for Spain's cession of Florida effected taking).

Three of the courts that have recently cited *Gray,* that is, *American International Group, Inc. v. Islamic Republic of Iran,* 657 F.2d 430, 446-47 (D.C. Cir. 1981); *Chas. T. Main International, Inc. v. Khuzestan Water and Power Authority,* 651 F.2d 800, 813 n.20 (1st Cir. 1981); *Marschalk Co. v. Iran National Airlines,* 518 F. Supp. 69, 93 (S.D.N.Y.), *rev'd on other grounds,* 657 F.2d 3 (2d Cir. 1981), relied on it in determining that the Government's suspension of private claims against Iran through the Algiers Accords could be a taking to the extent that the Accords do not result in full compensation. Neither the Court of Appeals (the *Gray* court's successor) nor the Claims Court even mentioned *Gray* in deciding that no taking of SPC's property had occurred.

Throughout the twentieth century international lawyers and commentators, as well as the courts, have supported the proposition that the Government's extinguishment of private

claims against foreign nations can bring the Fifth Amendment's Just Compensation Clause into play. As pointed out by Professor Louis Henkin in *Foreign Affairs and the Constitution* (1972), the cession by the Government of the rights of private citizens raises issues of fairness and equity as well as questions under the Fifth Amendment. *Id.* at 260-66. *See also* Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States,* 22 Bus. Law. 3, 23-26 (1966).

Another learned commentator, Professor Covey Oliver, referring to settlement by the United States of its citizens' international claims, said:

> If the United States had done nothing, there would clearly have been no taking on the part of the United States, it seems certain. If it does act, we should not expect that due process problems could be avoided by the simple expedient of adverting to the old dogma that the international reclamation is the sovereign's cause of action, not the individual's. Despite this theory, the fact remains that something is being done by executive agreement to diminish or change the citizen's legal relationship to property.

Oliver, *Executive Agreements and Emanations from the Fifth Amendment,* 49 Am. J. Int'l L. 362, 374 (1955).[6] These

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6. Presaging Professor Oliver's comment quoted above, Philip C. Jessup, former Judge of the International Court of Justice and one of this country's preeminent authorities on constitutional law and the law of nations, stated:

> It follows from what has already been said that the old Vattelian fiction of the injury to the state through the injury to its national, should, in the ordinary claims case, be

(Cont'd)

observations are even more pertinent since the U.S. adoption in 1952 of the restrictive theory of sovereign immunity, which affords U.S. claimants, even in the absence of means of enforcement such as the arbitration clause in SPC's franchise agreement, access to U.S. courts to enforce many claims against foreign governments. *See* 78 Am. J. Int'l L. 678, 680 (1984).

The most recent judicial statements that the Government's extinguishment of private claims against foreign nations is a taking related to the 1981 Algiers Accords with Iran. In these cases the courts responded to Fifth Amendment challenges of the Accords by stating that, although the Government has the power to settle or suspend the claims of its citizens against Iran, full compensation will be required to the extent that the settlement does not provide this result.

In *Dames & Moore v. Regan, supra,* this Court held that the Claims Court would have jurisdiction over a claim that the Government's treatment of the Iranian claims was a taking without just compensation. Justice Powell went on to add:

> The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims, the jurisdiction of which this

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(Cont'd)

> abandoned. It is not inconsistent with such abandonment to agree that the state retains the right to represent its national, to be what has already been referred to as his agent for collective bargaining.

Jessup, *Responsibility of States for Injuries of Individuals,* 46 Colum. L. Rev. 903, 923 (1946).

> Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

Id. at 691 (Powell, J., concurring and dissenting in part) (footnote omitted). *Accord, American International Group, Inc. v. Islamic Republic of Iran,* 657 F.2d at 446-47 (citing *Gray* for the fact that "the Court of Claims has continually implied that in a proper case it would consider the cancellation of private claims by settlement to be such a taking"); *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority,* 651 F.2d at 814 ("There may well be situations when the President's extinction or 'settlement' of a claim against a foreign government, without the consent of the claimant, would constitute a 'taking' of private property for public 'use.' "); *Marschalk Co. v. Iran National Airlines,* 518 F. Supp. at 93 ("There can be no doubt that extinguishing Marschalk's. . .claim against. . .Iran. . .constituted a taking."); *Behring International, Inc. v. Miller,* 504 F. Supp. 552, 558 (D.N.J. 1980) (upholding Government's blocking of Iranian funds claimed by plaintiff on the ground that "[e]ven if said funds were ultimately utilized by the government in obtaining the release of the hostages, this court can envision no circumstances under which the plaintiff would not be entitled to compensation from the government"); *National Airmotive Corp. v. Government & State of Iran,* 499 F. Supp. 401, 406 n.10 (D.D.C. 1980) ("the United States always retains the option of spending tax funds in pursuit of its foreign policy objectives, as distinguished from private funds or claims to private funds"); *E-Systems, Inc. v. United States,* 2 Cl. Ct. 271, 274-75 (1983)

("[D]efendant seems to argue that if the taking of plaintiff's property is in the lawful exercise of the President's power to conduct foreign policy, the taking of plaintiff's property is not compensable. No case cited by defendant supports such a proposition. . . .").

It is remarkable that the Court of Appeals failed even to mention the Fifth Amendment precedents regarding international claims settlements, including *Ware, Gray* and all of the recent cases concerning the Iranian claims. A similar inattention to precedent by the Claims Court has already provoked critical attention from Monroe Leigh, former Legal Adviser of the State Department. "The court's treatment of the taking issue. . .is. . .controversial, especially in light of recent judicial interpretations of the Fifth Amendment." 78 Am. J. Int'l L. 678, 680 (1984).

The judiciary's recognition that extinguishment of U.S. nationals' claims is a taking accords with the settled principle of takings law, enunciated by this Court, that the total destruction by the Government of all rights in property has every possible element of, and therefore constitutes, a Fifth Amendment taking. *Armstrong v. United States*, 364 U.S. 40, 46, 48 (1960). In *Armstrong*, the Government had destroyed certain liens held by private citizens by its appropriation of the property that was subject to the liens. The liens were thereby extinguished under the doctrine of sovereign immunity. The court held that the Government's destruction of the liens was a taking:

> The final question is whether the Government's action constituted a "taking". . . . Before the United States [acted], petitioners had valid liens. . . . After transfer to the United States the liens. . .could not be enforced. . . . The result of

> this was a destruction of all petitioners' property rights. . . .
>
> * * *
>
> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens. . . . Since this acquisition was for a public use,. . . [the Government] did thereby take the property value of those liens within the meaning of the Fifth Amendment.

Id. at 46, 48-49. The rule that the destruction of property by the Government is a taking has been applied in numerous contexts even when the destruction was not complete. *E.g., United States v. Causby,* 328 U.S. 256, 261-62 (1946) (destruction of present use of land as poultry farm by military overflights); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (partial destruction of value of leasehold temporarily occupied by Government for wartime purposes); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414-15 (1922) (prohibition of use of subsurface mining rights which had nearly same effect as a complete destruction).

The Court of Appeals, however, neither applied nor distinguished the settled rule that complete destruction of property

by the Government is a taking. It simply stated that no taking was present where " '[t]he President, in the exercise of his constitutional prerogative [to normalize relations with the PRC], struck the bargain he determined would best accommodate all relevant interests. . . .' " 2a (quoting 4 Cl. Ct. at 246). Such a refusal to apply Fifth Amendment principles to the President's foreign affairs power is unjustified and erroneous, for this Court has repeatedly emphasized that the foreign relations power is one "which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 320 (1936); *see Reid v. Covert*, 354 U.S. 1, 16-19 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

Moreover, the Executive Agreement's advancement of important national interests in the arena of foreign relations cannot justify judicial derogation of constitutional protections. In other contexts this Court has expressly stated that governmental actions that entail destruction of property rights are not outside the rule that such destruction effects a taking — regardless of whether important public policies are promoted. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982); *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104, 127 (1978). A uniform theme that has run throughout previous judicial discussions of the effects of claims settlements on claimants' rights is the recognition that the Government's foreign policy interests do not obliterate its citizens' Fifth Amendment safeguards.

Nor can the Claims Court's reference to *Penn Central* justify departure from the Fifth Amendment rule that complete destruction of property is a taking. *Penn Central* required the determination whether a taking resulted from governmental restrictions or interference that fall short of completely destroying all rights in property. Thus, the Court in *Penn Central* cited with

approval such destruction cases as *United States v. Causby* and *Armstrong v. United States*, noting that they involved governmental actions that "destroyed," and distinguished them from the landmarks preservation law at issue in *Penn Central* which had "in nowise impaired the present use of the [property]." *Id.* at 127-28, 135. The Claims Court's comparison of the Government's extinguishment of SPC's claim to governmental regulatory actions, such as those in *Penn Central*, is therefore in error. A complete destruction of property is not akin to a use restriction and should not be so treated. *See also United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) ("complete destruction" of lien renders *Penn Central* not determinative); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982) (*Penn Central* not determinative where physical occupation "destroys" portion of each of owner's property rights).

In *Loretto v. Teleprompter Manhattan CATV Corp., supra*, which involved a state law prohibiting landlords from preventing insertion of a cable television switchbox in their apartment buildings, the court reasoned:

> Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, cf. Andrus v. Allard, 444 U.S. 51, 65-66 (1979), the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Id. at 435. The Executive Agreement has accomplished a far greater invasion of SPC's property than that in *Loretto*. In this case the Government has not merely taken "a slice of every strand" of SPC's property, but has in fact destroyed the entire "bundle" of SPC's rights "to possess, use and dispose of" its property.

Id. (quoting *United States v. General Motors Corp.*, 323 U.S. at 378).

Finally, the Court of Appeals was wrong to suggest that no taking had occurred because "the settlement provided [SPC] with some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one." (2a). If this were the law, the Government's payment of any compensation — however small — in a claims settlement would always be sufficient. The courts below assumed that SPC's claim against the PRC was worth more than the payments SPC expects to receive under the Executive Agreement, a conclusion that is more than amply supported by the FCSC's considered determination, which is "final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise." 22 U.S.C. § 1623. However, the adequacy of whatever compensation SPC may be paid is not relevant to the taking issue. *See Armstrong v. United States*, 364 U.S. at 45, 49.

The Government's power to conclude claims settlements such as the Executive Agreement is unquestioned. The courts have consistently indicated, however, that the Government's exercise of this power is not immune from the strictures of the Just Compensation Clause. SPC submits that claims settlement agreements effect a taking under established Fifth Amendment principles when, as here, they extinguish all rights in the claims of U.S. nationals. The Court of Appeals ignored those principles, and SPC's petition squarely raises the question whether the Executive's foreign relations power can, contrary to Justice Powell's admonition in *Dames & Moore*, displace the Just Compensation Clause.

CONCLUSION

This case raises a substantial issue of national importance under the Just Compensation Clause worthy of review by this Court, and petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit.

Dated: July 12, 1985

Respectfully submitted,

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DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED FEBRUARY 13, 1985

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 84-860

SHANGHAI POWER COMPANY,

Appellant,

v.

THE UNITED STATES

Appellee.

DECIDED: February 13, 1985

Before MARKEY, *Chief Judge,* NICHOLS, *Senior Circuit Judge,* BLADWIN, KASHIWA, and MILLER, *Circuit Judges.*

KASHIWA, *Circuit Judge.*

Decision

DECISION

The decision of the Claims Court (Kozinski, Chief Judge), dismissing a claim by Shanghai Power Company (Shanghai) for just compensation upon dispositive cross-motions for summary judgment, 4 Cl. Ct. 237 (1983), is *affirmed.*

OPINION

Assuming for purposes of the motion that Shanghai's "claim" against the Peoples Republic of China constituted property, and that the claim was "worth" more than Shanghai received as a result of the settlement negotiated by the President, we conclude as did the Claims Court, that no taking without just compensation has occurred:

> With appropriate regard for the interests of the nation as a whole (including those of [Shanghai] and the other claimants), the President normalized relations with the PRC. Neither normalization of relations nor satisfaction of [Shanghai's] claim would have been possible without the other. The President, in the exercise of his constitutional prerogative, struck the bargain he determined would best accommodate all relevant interests . . . (footnote omitted).

4 Cl. Ct. at 246. The Claims Court in the omitted footnote noted that the President's action resulted in both direct and incidental benefits to plaintiff. Directly, the settlement provided plaintiff with some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one.

Decision

Because Shanghai has not shown error requiring reversal of the Claims Court's judgment, we affirm. We appreciate Judge Miller's observation under 28 U.S.C. §1502 but we need not rule on it where the cause of action is without merit. *Monett v. United States,* 419 F.2d 434, 436 n.4 (Ct. Cl. 1969), *cert. denied,* 400 U.S. 846 (1970); *Boeing Co. v. U.S.,* 480 F.2d 854, 856 (Ct. Cl. 1973).

MILLER, *Circuit Judge,* concurring.

I concur in the result reached by the majority, but would affirm the Claims Court's decision to dismiss, because I am persuaded that Shanghai's claim is one "growing out of" or "dependent upon" a treaty within the meaning of 28 U.S.C. §1502.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84-860

SHANGHAI POWER COMPANY,

Appellant,

v.

THE UNITED STATES,

Appellee.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this casse,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

April 16, 1985
Date

/s/ Dorothy I. Meyers
Dorothy I. Meyers, Chief Deputy

cc: Richard C. Allison
David Cohen

OPINION OF THE UNITED STATES CLAIMS COURT BY KOZINSKI, C.J. FILED DECEMBER 30, 1983

IN THE UNITED STATES CLAIMS COURT

NO. 674-81C

Taking; property interest subject to taking; international claim arising from expropriation; international claim settled by President; President's power to conduct foreign relations.

SHANGHAI POWER COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Richard C. Allison, New York, N.Y., with whom were *David R. Almond* and *Reid & Priest,* for plaintiff.

Stephen G. Anderson, Washington, D.C., with whom were *Acting Assistant Attorney General Richard K. Willard* and *David M. Cohen,* for defendant.

OPINION

KOZINSKI, Chief Judge.

The President settled plaintiff's claim against the People's Republic of China (PRC) without plaintiff's consent. The question presented is whether plaintiff can state a claim under the just

compensation clause of the fifth amendment for the difference between what it received under the terms of the settlement and what it believes the claim was worth.

Facts

Starting in 1929, plaintiff Shanghai Power Company, a Delaware corporation, owned and operated a power plant in Shanghai, China. A franchise agreement between plaintiff and the Shanghai Municipal Council allowed plaintiff to generate and distribute electricity in the Shanghai area.

In 1950, the People's Republic of China confiscated all property within its borders belonging to U.S. nationals, including plaintiff's power plant. From that time until 1979, when the United States normalized relations with the PRC, plaintiff received no compensation for the loss of its property.

In 1966, Congress authorized the Foreign Claims Settlement Commission (FCSC) to evaluate the claims of U.S. nationals against the PRC. On the basis of the evidence presented by the claimants, the Commission in 1972 determined the value of the property seized by the PRC to have been about $197 million. Plaintiff's share of this amount was almost $54 million. The Commission also found that the claimants were entitled to 6% simple interest from the date of taking; with interest, plaintiff's claim came to more than $144 million.

In 1979, President Carter established diplomatic relations with the PRC. As part of the normalization process, the two nations settled the outstanding claims of U.S. nationals against the PRC. The claims were settled for $80.5 million to be paid to the United States over a period of six years. The United States, in turn, has

been paying each of the claimants a pro rata share of the amounts received from the PRC, minus a small administrative fee. Under the terms of the settlement, plaintiff is due to receive approximately $20 million, or $124 million less than under the FCSC formula. Plaintiff is suing to recover that difference from the United States.

Plaintiff argues that President Carter settled its claim against the PRC for a mere fraction of its value in order to achieve broader foreign policy objectives. It cites various White House and State Department pronouncements indicating that normalization of relations with the PRC was considered a highly desirable objective. Plaintiff suggests that the President and the State Department considered the outstanding claims of the U.S. nationals a hindrance to normalization of relations and decided to remove the obstacle by sacrificing those claims. This enabled the President to achieve a public purpose—the normalization of relations with the PRC—at its expense. This, plaintiff argues, is a taking for which it must be compensated. Defendant disagrees. The parties have cross-moved for summary judgment.

Discussion

In order to state a claim for a taking under the fifth amendment's just compensation clause, the plaintiff must establish that it was the owner of property and that such property was taken by the United States for a public purpose. *Public Water Supply District No. 3 v. United States,* 133 Ct. Cl. 348, 352 (1955). Because plaintiff's claim raises novel issues, each component of this test must be examined in turn.

A. *Did plaintiff have property?*

1. The concept of property for purposes of the fifth amendment has been interpreted broadly and can include "every

sort of interest the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (leaseholds are property). *See also Armstrong v. United States*, 364 U.S. 40, 44 (1969) (lien is property); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (contract rights are property); *In re Air Crash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982) (claims for compensation are property).

On the other hand, not all interests or expectancies amount to property for purposes of the fifth amendment. As the Supreme Court has noted, only those rights "which have the law back of them" are property. *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (quoting *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)). *Cf. Deltona Corp. v. United States*, 228 Ct. Cl. 476, 491 (1981) (mere expectancy is not property). For example, no property interest can be acquired in the high water level of a river. *Willow River Power Co.*, 324 U.S. at 511. Similarly, a private party cannot generally acquire rights in the navigable waters of the United States. *See, e.g., United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913). *See generally* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 Nat. Resources J. 1 (1963). *But see Kaiser Aetna*, 444 U.S. at 178. A person also acquires no property interest in contraband, *see Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 140 (1939), or by virtue of an expectancy unsupported by a contractual or other obligation. *See United States v. Petty Motor Co.*, 327 U.S. 372, 380 n.9 (1946) (expectation that lease would be renewed is not property); Restatement (Second) of the Foreign Relations Law of the United States § 191 illustration 2 (1965) (beneficiary of will has no property interest during life of testator) [hereinafter cited as Restatement].

From these authorities it appears that a plaintiff's interest will be recognized as property for purposes of the fifth amendment unless that interest is devoid of a legally enforceable right or recognition of a property interest would contravene public policy. Under this standard, plaintiff's claim against the PRC amounts to property. The United States has consistently taken the view that foreign governments are entitled to confiscate property belonging to U.S. nationals. *See, e.g.,* Note from U.S. Secretary of State Hull to Mexican Ambassador in Washington (Apr. 3, 1940), quoted in 3 G. Hackworth, *Digest of International Law* 662 (1942). However, the United States has also consistently maintained that such a taking must be accompanied by "adequate, effective and prompt compensation." *Id.*[1] *Accord* Restatement §§ 185-190. The right to such compensation for an expropriation is, moreover, a principle recognized in international law, Domke, *Foreign Nationalizations,* 55 Am. J. Int'l L. 585, 603-04 (1961), and one the United States has consistently supported. *See generally* 8 M. Whiteman, *Digest of International Law* 1085-1136 (1967) [hereinafter cited as Whiteman, Digest].

Defendant argues that plaintiff's claim is not property because plaintiff could not have raised it against the PRC in American courts under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (1976), since the expropriation was an act undertaken by the PRC in its sovereign capacity. *See, e.g., International Association of Machinists and Aerospace Workers*

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1. Indeed, in the view of the United States, the legality of a taking by a foreign government hinges on whether compensation is provided. Hull Note, *quoted in* 3 G. Hackworth at 662; United States Note to Rumania (Sept. 7, 1948), *reprinted in* 19 U.S. Dep't of State Bull. 408 (1948) (expropriation that does not provide for equitable valuation and prompt adequate and effective compensation is not recognized).

v. OPEC, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Plaintiff responds that it could nevertheless have established jurisdiction under the FSIA by virtue of the licensing agreement under which it operated its power plant.[2] It is unnecessary to resolve this dispute because the existence of jurisdiction under the FSIA has no bearing on the threshold question of whether plaintiff has property for purposes of the fifth amendment. *But see* p. 5 & n.4 *infra*. The FSIA does not affect the substantive law of liability; it merely provides a forum for the presentation of claims established elsewhere. H.R. Rep. No. 1487, at 12, 1976 U.S. Code Cong. & Ad. News 6610. Whether plaintiff has a judicial forum in this country (or elsewhere) to present its claim has no relevance to whether its claim has the law back of it. Even if it were established, as defendant argues, that no suit could be maintained under the FSIA, or indeed in any court in any country, that would not change the fact that international law gives plaintiff an entitlement to full and just compensation, and that our government has consistently endorsed that right.

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2. Plaintiff suggests that the PRC acquiesced in the validity and continued effect of the agreement, rendering the relationship commercial in nature. *See National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 641-42 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) (contractual relationship with government is commercial despite public purpose of transaction). Moreover, the license agreement contained an arbitration clause that, plaintiff argues, implicitly waives sovereign immunity for purposes of the FSIA. *See* 28 U.S.C. § 1605(a)(1) (1976); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6617 (agreement to arbitrate abroad may constitute implicit waiver of sovereign immunity) [hereinafter cited as H.R. Rep. No. 1487]. The legislative history of the FSIA specifically refers to agreements to arbitrate as implicit waivers of sovereign immunity that would justify assertion of jurisdiction by a U.S. court. H.R. Rep. No. 1487, at 18, 1976 U.S. Code Cong. & Ad. News 6617.

Opinion

While in the domestic context it is difficult to conceive of a right without reference to a forum where the right can be enforced, that concept is not foreign to international law. *See generally* 1 M. Whiteman, *Damages in International Law* 275 (1937). Indeed, much of our government's efforts in espousing claims of its citizens has been devoted to establishing fora for such rights, generally in the nature of international commissions or tribunals. *See* M. Hudson, *International Tribunals* 3-14 (1944).

Rights created under international law against foreign governments are generally more difficult to vindicate than those created under domestic law between private parties. That does not, however, render international legal rights so illusory as to exclude them altogether from the classification of property. There is no doubt that rights created by virtue of an expropriation are backed by accepted principles of international law. Moreover, recognition of such rights is not contrary to our public policy, but, indeed, is consistent with the repeated expressions of our State Department.[3] The court therefore concludes that plaintiff's claim against the PRC had the law back of it and amounted to property for purposes of the fifth amendment.

2. To hold that plaintiff had property does not, however, establish its value. The court rejects plaintiff's contention that the value was that determined by the Foreign Claims Settlement Commission. The FCSC made its valuation entirely on an ex parte basis, with plaintiff alone producing evidence. *See generally* 8

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3. It should be noted that not all nations have recognized this principle. *See* n.15 *infra*. Our government has, however, been among the strongest proponents of the view that the right to full and fair compensation exists and must be respected by other nations. It would be inappropriate for this court to adopt a contrary position.

Whiteman, *Digest* 1146-50. Moreover, the FCSC was valuing an entirely different asset than that allegedly taken here. The Commission's function was to determine the value of plaintiff's plant, i.e., the bricks, mortar, power generators, etc. In 1979, however, at the time of the alleged taking by the United States, plaintiff no longer owned these assets; instead it owned a claim for compensation against the PRC. The value of that claim might have been the same as that of the underlying property but it might have been different. That value would depend upon the likelihood of finding a forum for presenting the claim,[4] overcoming all relevant defenses and obtaining satisfaction from the debtor's available assets. Moreover, the expense of prosecuting such a claim and obtaining satisfaction would have to be taken into account. *See also* n.15 *infra.*

It is impossible to determine the value of plaintiff's property interest without proof on these issues. Consequently, the court cannot decide whether the value is more or less than what plaintiff is receiving from settlement of its claim by the President. For purposes of these motions, the court must therefore assume that plaintiff not only had a property interest but that such interest was worth more than plaintiff is receiving as a result of the settlement of its claim by the President.

B. *Was there a taking?*

1. The Supreme Court has noted that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*

4. The existence of jurisdiction under the FSIA might well be relevant in determining the value of plaintiff's interest.

v. United States, 364 U.S. 40, 49 (1960); *accord Deltona Corp.,* 228 Ct. Cl. at 488. The Court has admitted, however, that it "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). The Court has repeatedly admonished that the determination must be made on the basis of "the particular circumstances [of each] case." *Id.* (quoting *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958)); *accord Deltona Corp.,* 228 Ct. Cl. at 488; *see Yuba Goldfields, Inc. v. United States,* No. 83-912, slip op. at 5-6 (Fed. Cir. Dec. 14, 1983).

In determining whether there has been a taking it is important to distinguish in the first instance between those governmental actions that amount to a physical invasion or other appropriation of property[5] and those actions where the government is serving as an arbiter between the conflicting rights and interests of its citizens.[6] *See generally* Sax, *Takings and the Police Power,* 74 Yale L.J. 36, 38-41 (1964). As the Court noted in *Penn Central,* a taking is "more readily . . .found when the interference with property can be characterized as a physical invasion by

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5. *E.g., United States v. Causby,* 328 U.S. 256 (1946) (overflights directly above plaintiff's land); *United States v. Cress,* 243 U.S. 316 (1917) (repeated flooding of land); *King v. United States,* 192 Ct. Cl. 548 (1970) (intermittent but permanent and substantial flooding of land).

6. *E.g., Agins v. City of Tiburon,* 447 U.S. 255 (1980) (zoning ordinance); *Mosca v. United States,* 189 Ct. Cl. 283 (1969) (denial of application for registration of fungicide), *cert. denied,* 399 U.S. 911 (1970)

government . . .than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124.

Even when government is serving as an arbiter between conflicting rights, its action can amount to a taking if it frustrates "distinct investment-backed expectations" of the property owner. *Penn Central,* 438 U.S. at 124; *Deltona Corp.,* 228 Ct. Cl. at 487. This somewhat cryptic phrase describes a concept of fundamental justice and fair play, and suggests that even valid regulatory action can result in a taking if government shifts too heavy a burden upon a few individuals, and does so in a sudden and unanticipated manner so that those adversely affected have little opportunity to protect themselves in the marketplace.

Factors relevant to whether there has been a taking are the degree to which the property owner's rights were impaired,[7] the extent to which the property owner is an incidental beneficiary of the governmental action,[8] the importance of the public interest

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7. "[T]he denial of one traditional property right does not always amount to a taking . . . [W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979). Restrictions on the use of property that have greatly diminished its value have not amounted to takings if significant value was left to the property owner. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (75% diminution in value); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) (92.5% diminution in value). *See also Agins v. City of Tiburon,* 447 U.S. 255, 262-63 (1980) (plaintiff who had intended to use land for multiple unit construction limited to five single family dwellings); *Jentgen v. United States,* 228 Ct. Cl. 527, 533-34 (1981), *cert. denied,* 455 U.S. 1017 (1982) (plaintiff who sought to develop 80 acres limited to 20 acres).

8. *Agins,* 447 U.S. at 262; *Penn Central,* 438 U.S. at 134-35; *Deltona Corp.,* 228 Ct. Cl. at 489.

to be served,[9] whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries,[10] and whether the action substituted any rights or remedies for those that it destroyed.[11] In determining whether a taking has occurred the court must weigh all of the relevant factors and decide whether compensation is required by principles of justice and fair play. *See Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Deltona Corp.*, 223 Ct. Cl. at 488.

2. The occasion for diplomatic espousal and settlement of a claim arises when one or more of our nationals runs into difficulty collecting a debt from a foreign government.[12] That event may have implications going far beyond the particular debt in question or the parties raising the claim. It is axiomatic that

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9. Courts have permitted the complete destruction or grave impairment of property rights where the governmental interest in question was sufficiently strong. *See, e.g., National Board of Young Men's Christian Associations v. United States*, 395 U.S. 85 (1969) (damage to buildings caused by efforts to quell rioting); *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of cedar trees to prevent infection of apple orchards); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition against continued operation of brickyard).

10. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594-95 (1935).

11. *Penn Central*, 438 U.S. at 137; *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 452-53 (1937).

12. Espousal is not generally appropriate unless "the American national has exhausted such local remedies as may be open to him and has sustained a denial of justice as that term is understood in international law." Letter from Attorney Adviser Matre, Office of the Assistant to the Legal Adviser for International Claims, to Hershel Davis (May 14, 1956), *quoted in* 8 Whiteman, *Digest* 907. Denial of justice is a complex concept in international law and can be summarized only imperfectly as follows:

(Cont'd)

our government cannot guarantee unimpeded commerce with foreign nations, nor even the lives and property of U.S. nationals outside our territory. The degree to which our government is able to assist U.S. nationals abroad depends largely on its ability to maintain amiable relations with other governments.

When a foreign government reneges on a debt to a U.S. national "a claimant's only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf." *Dames & Moore v. Regan,* 453 U.S. 654, 679 (1981). The President, however, has no obligation to take up a national's claim and present it diplomatically to a foreign government. *See Aris Gloves, Inc. v. United States,* 190 Ct. Cl. 367, 380-381 (1970) (quoting 6 *Memoirs of John Quincy Adams* 383 (C. Adams ed. 1874)). The reason for this is made clear by Adams: It is frequently very difficult to obtain justice from foreign

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> Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

Responsibility of States for Damage Done to Foreigners, 23 Am. J. Int'l L., Apr. 1929, at 173 (Special Supp.). *See generally* Restatement § 165 & comment c. Thus, for example, the United States determined that espousal of claims of U.S. citizens against Hungary was warranted in 1950 because "present conditions in Hungary make it impossible in a practical sense for an American citizen to exercise local remedies under Hungarian laws and before Hungarian courts." United States Note to Hungary (Mar. 3, 1950), *reprinted in* 22 U.S. Dep't. of State Bull. 399 (1950). This conclusion was based, inter alia, on the fact that U.S. citizens "cannot freely obtain the services of a Hungarian attorney of [their] choice effectively to assert [their] rights." *Id.*

nations, even when the claim is a strong one; therefore, a country asserting the claim may have to resort to war to force satisfaction of the claim, and war may inflict greater, uncompensated injury upon many other people. *Id.*

Because a government's refusal to honor debts owed a foreign national is frequently symptomatic of more serious problems between the two countries, governments have traditionally espoused and settled claims without the consent of the nationals holding the claims and "usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." *Dames & Moore,* 453 U.S. at 680 (quoting L. Henkin, *Foreign Affairs and the Constitution* 262-63 (1972)); *accord* Restatement § 213; 8 Whiteman, *Digest* 1216-23 & authorities cited. As the Court noted, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are sources of friction between the two sovereigns." 453 U.S. at 679 (citing *United States v. Pink,* 315 U.S. 203, 225 (1942)). While individuals may have legitimate claims against foreign nations, and may have recourse to some self-help remedies, the presence of these claims and the claimants' attempts to collect may seriously harm the relations between the two countries. The power of the sovereign to alleviate this point of friction and reestablish amiable relations between the two countries is consistent with "established international practice reflecting traditional international theory." *Dames & Moore,* 453 U.S. at 679 (quoting L. Henkin at 262).

Our Presidents have exercised the power to settle international claims of U.S. nationals at least since 1799. *Dames & Moore,* 453 U.S. at 679 n.8. In the century between 1817 and 1917, for example, there were no fewer that 80 such agreements. *Id.* (citing W. McClure, *International Executive Agreements* 53 (1941) and

14 Whiteman, *Digest* 247).[13] There is no doubt that the President's power to settle international claims and to eliminate these "sources of friction" is an integral aspect of his authority to conduct the foreign relations of the United States. As Chief Judge Learned Hand succinctly noted:

> [t]he continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.

Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951).

Every U.S. national who trades in foreign commerce or who travels abroad is a potential beneficiary of the President's authority to settle claims. When tensions arise between our nation and another, those caught in the middle must rely upon the President to safeguard their lives and property to the greatest extent possible. This may mean that others who have claims against the foreign sovereign may be blocked from seeking to collect their debts so that international tensions will not be exacerbated. Yet, in times of emergency, it is frequently entirely fortuitous who will benefit and who will suffer from any such presidential action. The possibility that the President will intervene in this manner is

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13. For a description of the United States modern practice in settling international claims *see* Brief for the United States as *amicus curiae* at 30-32, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *reprinted in* 2 I.L.M. 1009, 1019 (1963).

properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad.[14]

The rights of nationals trading or traveling abroad are bound up in another, perhaps more fundamental, aspect of a nation's foreign relations. It is the existence of cordial relations between nations that makes trade possible. Channels of commerce and travel that are free from danger and coercion are as crucial to international trade as to domestic trade. Achieving such safety is, however, much more difficult internationally with multitudious states and factions claiming sovereignty over sometimes overlapping portions of the globe. Americans who trade or travel abroad rely upon the fabric of relationships established between our government and others as the foundation for all rights and privileges that make their enterprises possible. When that fabric is strained or torn, placing some individual interests in jeopardy, it may not be possible to repair it without sacrificing some pre-existing rights. Yet, if that fabric is not repaired, such rights would be lost in any case.

The circumstances here illustrate this point. For well over 20 years after the PRC seized its plant, plaintiff did absolutely nothing to obtain compensation. The reason for this was simple and clearly stated by plaintiff's counsel: "There was no opening

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14. This concept is inherent in the nature of diplomatic espousal. A government's right to assert the claim of its nationals is premised upon the doctrine that injuries to a country's nationals are injuries to the country itself. *See, e.g., Frelinghuysen v. Key,* 110 U.S. 63, 71-72 (1884). While this doctrine has been subject to criticism, Jessup, *Responsibility of States for Injuries to Individuals,* 46 Colum. L. Rev. 903, 923-24 (1946), there is much wisdom behind it. An injury to a country's nationals can be an injury to the country itself because it will generally implicate rights and interests of persons other than those directly affected.

to China. There was no communication. There was nothing we felt we could do in those years." Transcript of Proceedings, Sept. 29, 1983, at 16. It was only the normalization of relations with the PRC, and the consequential resumption of communication and commerce between the two countries, that held out hope for plaintiff to receive *any* satisfaction of its claim. Yet, settlement of outstanding claims against the PRC was a sine qua non of normalized relations between the two countries. Had the President refused to settle these claims at less than 100 cents on the dollar, there might well have been no normalization and plaintiff would have continued to be without any remedy at all, as it had been for the preceding 29 years.

In this light, plaintiff's argument that the President sacrificed its claim to obtain normalization with the PRC could well be stood on its head: Without normalization, plaintiff's claim would have remained unsatisfied as it had been for almost three decades. Rather than an unexpected loss, therefore, the compromise settlement obtained by the President could be characterized as a windfall gain.[15] The truth no doubt lies somewhere in between:

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15. There is serious doubt whether plaintiff had any possibility of securing compensation from the PRC without the intervention of our government. While the principle of just compensation for expropriations is one that our government strongly supports, this view is not necessarily shared by Communist and Third World countries. The Supreme Court has recognized this point:

> Communist countries, *although they have in fact provided a degree of compensation after diplomatic efforts,* commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally

(Cont'd)

With appropriate regard for the interests of the nation as a whole (including those of plaintiff and the other claimants), the President normalized relations with the PRC. Neither normalization of relations nor satisfaction of plaintiff's claim would have been possible without the other. The President, in the exercise of his constitutional prerogative, struck the bargain he determined would best accommodate all relevant interests. This is a classical adjustment of "the benefits and burdens of economic life to promote the common good." *Penn Central,* 438 U.S. at 124.[16]

(Cont'd)

> articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429-30 (1964) (emphasis added). For an excellent survey of the divergent views as to the responsibility of states to provide just compensation for nationalizations see Brief for petitioner at 34-38, 45-51, *Sabbatino, supra, reprinted in* 2 I.L.M. 1149, 1149-50, 1152-53 (1963).

16. The President's action resulted in both direct and incidental benefits to plaintiff. Directly, the settlement provided plaintiff with some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one. *See Kuehner v. Irving Trust Co.*, 299 U.S. at 453. Moreover, even if one were to assume that plaintiff could have recovered the full $144 million it claims from the PRC without significant expenditures, the diminution in value to $20 million reduces the claim by only about 85%. In appropriate circumstances, diminutions in value in that amount or greater have been held not to amount to a taking. *See* p. 7 & nn. 7 & 9 *supra.* In addition, like all other persons in the United States, plaintiff is an incidental beneficiary of normalization because it may now engage in profitable trade with the PRC and take advantage of goods imported from the PRC by others. Plaintiff also shares with other U.S. nationals the benefit of enhanced security that presumably resulted from normalization of relations.

The compromise of plaintiff's claim is not a drastic and unexpected interference with its investment-backed expectations that offends traditional concepts of justice and fair play. As noted earlier, the President's power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well established aspect of international law. Plaintiff cannot claim to be surprised by its exercise. Plaintiff did business on foreign soil in an area of the world where the potential for expropriation existed. The possibility that our government would have to intervene to protect American interests in such circumstances was clearly present. Plaintiff had sufficient opportunity to consider these risks in deciding to locate its power plant in Shanghai and the profits it derived during the 17 years of operation should have reflected these considerations.

The concept that the government might step in and discharge debts and otherwise compromise the rights of creditors is hardly novel even in the domestic context. For example, under certain circumstances a debtor may file for bankruptcy and thereby force an orderly distribution of assets and a discharge of its liabilities. The filing of such a petition has a profound effect upon the rights of creditors. Payments made and liens obtained within a specified time before filing can be set aside or recovered as preferences; the right to pursue self-help remedies is abrogated; debts are discharged with the creditor generally allotted a small fraction of the amount due and sometimes nothing. *See* 11 U.S.C. §§ 547, 362(a)(3), 727, 1141, 1328 (Supp. V 1981).

Bankruptcy proceedings are an attempt by our government to deal with the unpleasant reality that debtors sometimes are unable to meet their obligations. Congress has determined that an orderly liquidation of liabilities serves the interests of commercial stability better than piecemeal dismemberment of a

debtor's assets. *Report of the Commission on the Bankruptcy Laws of the U.S.*, H.R. Doc. No. 137, 93d Cong., 1st Sess. 71 (1973), *reprinted in Collier On Bankruptcy*, app. 2, pt. 1, at 71 (1983). Also, there is a strong policy in favor of giving a debtor a second chance so that he will not be oppressed by debts he may never be able to discharge in full. *See Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915).

In light of these important policy considerations, a creditor cannot argue that bankruptcy proceedings are unlawful because he could have collected more had he been permitted to pursue other remedies. *See In re 1030 North Dearborn Building Corp.*, 9 F. Supp. 972, 974 (E.D. Ill. 1935). Nor will a creditor be allowed to claim a taking because the debt has been discharged even though the debtor may eventually be able to pay off the full amount. The policy of giving debtors a fresh start takes precedence over any hope a creditor may have of satisfying his debt. Of course, when the bankruptcy power is exercised in a wholly novel and unexpected manner, frustrating the legitimate expectations of creditors, it may amount to an unconstitutional taking. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 581-89, 602 (1935); *see United States v. Security Industrial Bank*, 459 U.S. ____, ____, 103 S. Ct. 407, 410-12 (1982). However, once the rules of the game are established so that creditors are able to factor them into their business decisions, there can be no question of a taking. *See In re Webber* 674 F.2d 796, 803-04 (9th Cir.), *cert. denied*, ____ U.S. ____, 103 S. Ct. 567 (1982).

There are, of course, significant differences between the discharge of domestic debts under bankruptcy law and the

discharge of international debts by action of the President.[17] Yet, the similarities are striking. Both types of actions respond to the failure of a debtor to meet its obligations. In both situations, the debtor may be relieved of obligations that it could eventually pay; in both cases, self-help remedies that might be advantageous to a particular creditor are abrogated in favor of a common solution that maximizes the overall good. And, in both situations, bona fide claims of individuals may be discharged to promote public objectives.

Moreover, the President's power to espouse and discharge claims against foreign nations is as integral an aspect of foreign commerce as the bankruptcy system is of domestic commerce. Businessmen derive significant benefits from the existence of these powers and their occasional exercise has a stabilizing effect on domestic and foreign trade respectively. In any event, they are part and parcel of the understanding businessmen share about the realities of the marketplace. The President's power to settle international debts has been exercised repeatedly throughout our history. *See* p. 9 *supra*. Those who trade with foreign governments or who hold property in foreign countries must take it into account just as businessmen must consider the existence of our bankruptcy system in structuring their domestic transactions.

4. This case presents considerations in addition to those applicable to more traditional taking cases because it implicates the President's power to conduct the foreign relations of the United States. As the Supreme Court has noted, "[t]hat there are

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17. That the bankruptcy system is established by statute is not a material difference because the President's power to espouse and settle claims has the approval of Congress and therefore the force of law. *Dames & Moore*, 453 U.S. at 680-82.

differences between [the power to conduct foreign affairs and domestic affairs] and that these differences are fundamental, may not be doubted." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936). The differences arise from the fact that in foreign affairs "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *Id.* at 319. The legislative and judicial branches of government must exercise their powers so as not to interfere with the President's conduct of foreign relations. *See Ex Parte Peru*, 318 U.S. 578, 586-88 (1943); *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).[18]

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18. Early in our history the principle was established that constitutional limitations on the President's authority to conduct foreign relations must be policed largely by the President himself lest our security be impaired:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. *For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.* The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

Senate Committee on Foreign Relations, Report, 14th Cong., 1st Sess. (Feb. 15, 1816), *reprinted in* Senate Committee on Foreign Relations, Compilation of Reports, 8 S. Rep. No. 231, 56th Cong., 2d Sess. 24 (1901) (emphasis added).

Opinion

Plaintiff's argument that the President sacrificed its claim against a foreign sovereign in order to promote our national interests could be raised by anyone whose claim has been settled at less that 100% of what he thinks it was worth. And in every case there would no doubt be significant evidence pointing to some such ulterior motive. A settlement agreement between two nations, even one that on its face deals with nothing else,[19] does not take place in a vacuum; it is part of the continuing and evolving diplomatic relations between the sovereigns. An amicable resolution of differences may ease overall tensions, facilitating the achievement of other goals. In reviewing the delicate balance sheet of our diplomatic relations, it is always possible to argue that the President might have gained some advantage for the nation by failing to press an individual claim with as much vigor as the claimant might have wished.[20]

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19. *E.g.*, Agreement on the Settlement of Certain Outstanding Claims and Financial Issues, Jan. 29, 1982, United States-Czechoslovakia, *reprinted in* 21 I.L.M. 371 (1982).

20. A State Department memorandum by a noted Assistant Legal Adviser explains the inherent tension between the interests of individual claimants and those of the United States:

> The tendency of individual claimants to press unsound claims—for any loss sustained in a foreign country—and in grossly exaggerated form is well-known. Good faith among States requires that a State in espousing a claim against another State must be permitted to determine and press only claims, or that part of a claim, the soundness of which it is convinced, and to press it in terms of its own estimate of the amount of reparation due or reasonably to be received . . . *For a State to press unsound claims, either as to substance or as to amount of reparation or damage, against foreign States may well result in jeopardizing sound and*

(Cont'd)

A judicial inquiry into whether the President could have extracted a more generous settlement from another country would seriously interfere with his ability to carry on diplomatic relations. As the Supreme Court has recognized, secrecy lies at the very heart of the President's ability to conduct foreign relations. *Curtiss-Wright,* 299 U.S. at 320. This principle was established by our first President when he refused a congressional request for information pertaining to the negotiations of the Jay Treaty of 1794. In words that are as timely today as when they were first written, President Washington responded as follows:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence

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(Cont'd)

> *reasonable claims of other individual claimants in the same or other categories of claims existing at the same time or in the future.* An espousing State cannot afford to have its good name, its honor, compromised by espousing unsound and perhaps dishonest claims which its nationals or their lawyers may seek to have presented against foreign States.

Whiteman, Comments on Report on "International Responsibility" by Dr. Garcia-Amador 59-61 (Dec. 18, 1956) (unpublished memorandum), *quoted in* 8 Whiteman, *Digest* 1223 (emphasis added). Claimants may well disagree with our government's assessment that their claim is unsound or excessive. Nevertheless, it is the ultimate responsibility of the President, in safeguarding relations with foreign nations, to consider such claims skeptically and press only those that can properly be presented in light of all the circumstances. *See Frelinghuysen v. Key,* 110 U.S. at 75-76.

> on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

President's Message to the House of Representatives, Mar. 30, 1796, *reprinted in 1 Messages & Papers of the Presidents 1789-1897,* at 194-95 (J. Richardson ed. 1897).

Recognition of a cause of action for a fifth amendment taking on the basis of the President's settlement of a private claim would implicate many of these concerns. Any party dissatisfied with the settlement of its claim by the President would then seek to probe into the thought processes of our negotiators, perhaps even of the President, to establish what they had in mind when they struck the deal. At issue in such a lawsuit would be the entire spectrum of dealings between our country and another to determine whether a concession in the settlement agreement resulted in some collateral benefit to the United States. It is difficult to imagine a less appropriate or more intrusive exercise of judicial power.

Acknowledging this difficulty, plaintiff suggests that the court limit its inquiry entirely to facts disclosed on the public record. This suggestion is entirely unworkable. The public record, particularly concerning diplomatic negotiations, is inherently incomplete and frequently misleading. As Mr. Justice Frankfurter has noted, documents embodying settlements between nations "must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy." *United States v. Pink,* 315 U.S. 203, 241 (1942) (Frankfurter, J., concurring). In preparing such settlement agreements, the draftsman "must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder." *Id.* The same

is true of public statements made by our negotiators and the President in connection with such agreements. These expressions must be calculated "to settle both money claims and to soothe feelings." *Id.* at 242.

The public record accompanying the settlement thus is not merely evidence of what transpired, it is part and parcel of that process. The settlement document and the public statements surrounding it are calculated to take into account the political realities here and abroad; they may or may not paint a complete or accurate picture of what transpired at the negotiating table.[21] To rely only upon such public statements to divine the intentions and understandings of the parties could lead to an entirely erroneous or distorted conclusion.

The Supreme Court has noted that not all matters touching upon the foreign relations of the United States are off limits to judicial scrutiny. Rather, each problem must be assessed "in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture of the specific case, and of the possible consequences of judicial action." *Baker v. Carr,* 369 U.S. 186, 211-12 (1962). As the above analysis suggests, each of these factors strongly militates against recognition of the cause of action proposed by plaintiff.

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21. This case illustrates the point. Plaintiff argues that the public record unequivocally and overwhelmingly demonstrates a sacrifice of its claim against the PRC in order to achieve normalization. Defendant disputes this, suggesting that the statements cited by plaintiff can be interpreted quite differently. Plaintiff's Motion for Summary Judgment at 9-10, 22-23; Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 36-38.

Opinion

Conclusion

Plaintiff cannot state a claim for the taking of its property by the United States.[22] Its motion for summary judgment is therefore denied; defendant's motion is granted.

The clerk is directed to dismiss the petition with costs to the prevailing party. 28 U.S.C. § 2412(a) (Supp. V. 1981); RUSCC 54(d).

December 30, 1983

/s/ A. Kozinski

22. Because of the significant factual differences between this case and *E-Systems v. United States,* 2 Cl. Ct. 271 (1983) (MILLER, J.), it is unclear whether the two cases reach inconsistent results. Insofar as the approach taken in *E-Systems* would lead to a different result in this case, I respectfully note my disagreement.

JUDGMENT OF UNITED STATES CLAIMS COURT FILED DECEMBER 30, 1983

IN THE UNITED STATES CLAIMS COURT

No. 674-81 C

SHANGHAI POWER COMPANY

v.

THE UNITED STATES

JUDGMENT

Filed December 30, 1983

Pursuant to the opinion of December 30, 1983, it was held that plaintiff is not entitled to recover with the complaint to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, with costs to the prevailing party.

Frank T. Peartree
Clerk of Court

Dec. 30, 1983

By: /s/ Debra L. Sander
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

EXECUTIVE AGREEMENT

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA CONCERNING THE SETTLEMENT OF CLAIMS

In order to develop bilateral economic and trade relations and to complete the process of normalization of relations on the basis of equality and mutual benefit and in accordance with the spirit of the Joint Communique on Establishment of Diplomatic Relations between the United States of America and the People's Republic of China, the Government of the United States of America (hereinafter referred to as the "USA") and the Government of the People's Republic of China (hereinafter referred to as the "PRC") have reached this Agreement:

ARTICLE I

The claims settled pursuant to this Agreement are:

(a) the claims of the USA and its nationals (including natural and juridical persons) against the PRC arising from any nationalization, expropriation, intervention, and other taking of,

or special measures directed against, property of nationals of the USA on or after October 1, 1949 and prior to the date of this Agreement; and

(b) the claims of the PRC, its nationals, and natural and juridical persons subject to its jurisdiction or control against the USA arising from actions related to the blocking of assets by the Government of the USA on or after December 17, 1950 and prior to the date of this Agreement.

ARTICLE II

(a) The Government of the USA and the Government of the PRC agree to a settlement of all claims specified in Article I. The Government of the PRC agrees to pay to the Government of the USA the sum of $80.5 million as the full and final settlement of the claims specified in Article I. The Government of the USA agrees to accept this sum in full and final settlement of those claims.

(b) The Government of the USA agrees to unblock by October 1, 1979 all assets which were blocked because of an interest, direct or indirect, in those assets of the PRC, its nationals, or natural and juridical persons subject to its jurisdiction or control, and which remained blocked on the date of the initialing of this agreement, March 2, 1979. The Government of the USA further agrees, in a spirit of mutual cooperation, that prior to unblocking under this paragraph, it will notify the holders of blocked assets which the records of the Government of the USA indicate are held in the name of residents of the PRC that the Government of the PRC requests that assets of nationals of the PRC to be unblocked not be transferred or withdrawn without its consent.

Executive Agreement

ARTICLE III

The Government of the PRC shall pay to the Government of the USA $80.5 million of which $30 million shall be paid on October 1, 1979 and the remaining $50.5 million shall be paid in five annual installments of $10.1 million each on the first day of October with the first installment due on October 1, 1980.

ARTICLE IV

The Government of the USA shall be exclusively responsible for the distribution of all proceeds received by it under this Agreement.

ARTICLE V

After the date of signature of this Agreement, neither government will present to the other, on its behalf or on behalf of another, any claim encompassed by this Agreement. If any such claim is presented directly by a national of one country to the government of the other, that government will refer it to the government of the national who presented the claim.

ARTICLE VI

This Agreement shall enter into force on the date of signature.

This Agreement was signed on May 11, 1979 at Beijing, in duplicate, in the English and Chinese languages, both versions being equally authentic.

Executive Agreement

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA	FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA
/s/ Juanita M. Kreps	/s/ Zhang Jingfu

Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-65

In the Supreme Court of the United States

OCTOBER TERM, 1985

SHANGHAI POWER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, which recovered $20 million as the result of a 1979 Executive Agreement between the United States and the People's Republic of China (PRC) that settled the claims of United States nationals against the PRC, is entitled to compensation under the Just Compensation Clause of the Fifth Amendment for an alleged taking of its property to the extent that petitioner's recovery under the settlement agreement was less than the full value of its physical assets in China that were seized by the PRC in 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-65

SHANGHAI POWER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the United States Claims Court (Pet. App. 5a-30a) is reported at 4 Cl. Ct. 237.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1985 (Pet. App. 1a-3a), and a petition for rehearing was denied on April 16, 1985 (*id.* at 4a). The petition for a writ of certiorari was filed on July 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND EXECUTIVE AGREEMENT INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

2. The May 11, 1979 Executive Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, 30 U.S.T. 1957 *et seq.*, is reproduced at Pet. App. 32a-35a.

STATEMENT

1. Beginning in 1929, petitioner, a Delaware corporation, owned and operated a power plant in Shanghai, China. Petitioner distributed electricity in that area pursuant to a franchise agreement with the Shanghai Municipal Council. In 1950, the People's Republic of China (PRC) expropriated all of the property in China that belonged to United States nationals, including petitioner's power plant. The PRC paid no compensation for this expropriation until 1979. Pet. App. 6a.

In 1966, Congress directed the Foreign Claims Settlement Commission to evaluate the claims of United States nationals against the PRC, "in order to obtain information concerning the total amount of such claims against * * * the Chinese Communist regime." 22 U.S.C. 1643. See 22 U.S.C. 1643-1643k, as amended by Pub. L. No. 89-780, 80 Stat. 1365. The Commission then was to certify to the Secretary of State the amount of the loss suffered on each individual claim, so that this information could be used in any future diplomatic discussions with the PRC for the resolution of the claims. 22 U.S.C. 1643f(a); see H.R. Rep. 2233, 89th Cong., 2d Sess. 2 (1966); S. Rep. 1586, 89th Cong., 2d Sess. 2, 7, 9 (1966). Congress specified that this provision for computation of the amounts owed by the PRC was not to be construed as expressing any intention by Congress to authorize an appropriation of funds for the payment of such claims. 22 U.S.C. 1643. On the basis of submissions by claimants in ex parte proceedings, the Commission determined in 1972 that the total value of the

property seized by the PRC was approximately $197 million and that the value of petitioner's property was approximately $54 million (Pet. App. 6a).

In 1979, President Carter established diplomatic relations with the PRC. See *Goldwater* v. *Carter,* 444 U.S. 996 (1979). As part of the normalization process, the United States entered into an Executive Agreement with the PRC that settled the outstanding claims of United States nationals against the PRC (Pet. App. 32a-35a; 30 U.S.T. 1957 *et seq.* Under the Agreement, the United States received a total of $80.5 million, paid over a period of six years, as an aggregate payment for all outstanding claims (Pet. App. 34a). In 1980, Congress enacted a statutory provision for the distribution of this aggregate amount. 22 U.S.C. 1627(c), as added by Pub. L. No. 96-445, § 1(2), 94 Stat. 1891 *et seq.* As this Court has observed with respect to this settlement, Congress, in providing for the distribution of the funds received from the PRC, "did not question the fact of the settlement or the power of the President to have concluded it." *Dames & Moore* v. *Regan,* 453 U.S. 654, 681 (1981). See 126 Cong. Rec. 28480-28482 (1980). Under the statutory formula, petitioner received approximately $20 million. Pet. App. 7a.

2. Petitioner filed this action seeking to recover from the United States the sum of $124 million, which represented the difference between the $20 million allocated to it under the settlement and the $144 million that the Commission found to be the total value of the property in China ($54 million) plus accrued simple interest since 1950 (Pet. App. 7a). Petitioner argued that the President settled its claim for less than its full value in order to further the broader foreign policy objectives of the United States and that this action constituted a "taking" of its property for which the Fifth

Amendment requires the payment of compensation (*ibid.*). The Claims Court granted summary judgment in favor of the United States (Pet. App. 4a-30a).

a. The Claims Court first concluded that petitioner's claim against the PRC under international law for the expropriation of its holdings in China constituted "property" within the meaning of the Just Compensation Clause of the Fifth Amendment (Pet. App. 7a-11a). However, the court rejected petitioner's contention that the value of that property was the amount determined by the Foreign Claims Settlement Commission, because the Commission had calculated that amount in an ex parte proceeding and the Commission "was valuing an entirely different asset than that allegedly taken here" (*id.* at 11a-12a). The court observed that the Commission had determined the value of petitioner's physicial plant in China, which petitioner no longer owned when the President entered into the Executive Agreement with the PRC in 1979. At that time, petitioner's asset was only a claim against the PRC for compensation, the value of which would depend upon such factors as the likelihood of finding a forum for presenting the claim, overcoming all relevant defenses, obtaining satisfaction out of the PRC's available assets, and the cost of prosecuting the claim (*id.* at 12a). The court assumed for present purposes that the value of petitioner's claim against the PRC was more than it would receive under the settlement (*ibid.*), but the court nevertheless held that there had not been a "taking" of that claim by the United States (*id.* at 12a-30a).

b. The Claims Court recognized that under this Court's decisions, the question whether a "taking" has occurred turns on whether " 'justice and fairness' " require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated in a few persons. Pet. App. 12a-13a, quoting *Penn Central Transportation Co.* v. *New York City*, 438

U.S. 104, 124 (1978), and *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960). The court observed that in making this determination, it must consider such factors as "the degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those it destroyed." Pet. App. 14a-15a (footnotes omitted). Applying these principles, the Claims Court held that justice and fairness did not require a finding that the United States is liable for a "taking" of property in the circumstances presented.

The Claims Court first explained that the occasion for diplomatic espousal and settlement of a national's claim by his government arises where the national encounters difficulty collecting from the foreign government—an event that may have implications extending far beyond the particular debt or the parties seeking to recover on it and that is frequently symptomatic of more serious problems between the two countries (Pet. App. 15a-17a). In addition, the court noted that the claims themselves are often sources of friction between the two nations and that the power to alleviate this friction and reestablish amicable relations through the settlement of claims is "consistent with 'established international practice reflecting traditional international theory.' " *Id.* at 17a, quoting *Dames & Moore,* 453 U.S. at 679. By the same token, the court observed that when the foreign government reneges on a debt, the claimant's " 'only hope of obtaining any payment at all might lie in having his government negotiate a diplomatic settlement on his behalf.' " *Ibid.* quoting *Dames & Moore,* 453 U.S. at 679. In this case, for example, the court stressed that petitioner was unable to press its claim for more than 20 years after the

expropriation, and "[i]t was only the normalization of relations with the PRC" (of which the "settlement of outstanding claims against the PRC was a sine qua non") that "held out hope for [petitioner] to receive *any* satisfaction of its claim" (*id.* at 20a (emphasis in original)). Against this background, the court concluded that "[t]he President, in the exercise of his constitutional prerogative, struck the bargain he determined would best accommodate all relevant interests"; this action, in the court's view, was "a classical adjustment of 'the benefits and burdens of economic life to promote the common good,' " and not a taking. *Id.* at 21a, quoting *Penn Central,* 438 U.S. at 124.

The Claims Court noted as well that the President's settlement of petitioner's claim was "not a drastic and unexpected interference with its investment-backed expectations that offends traditional concepts of justice and fair play," because the President's power to espouse and settle claims "constitutes a well established aspect of international law" and thus formed part of the context in which petitioner invested in China in the first place (Pet. App. 22a). The court also found that the President's power to settle claims for less than their full value is analogous to the bankruptcy power, under which concededly valid debts may be discharged for less than their full amount in order to serve broader public purposes and to assure that individual creditors share ratably in the debtor's estate (*id.* at 22a-24a). Finally, the court was concerned that recognition of a cause of action under the Fifth Amendment in these circumstances would require the courts to second-guess the President's judgment as to what bargain was appropriate and feasible in the delicate diplomatic climate in which such negotiations often occur (*id.* at 24a-29a).

3. The court of appeals affirmed in a brief unpublished opinion (Pet. App. 1a-3a). The court assumed for purposes of its decision that petitioner's claim against the PRC

constituted "property" within the meaning of the Just Compensation Clause and that the claim was "worth" more than petitioner received as a result of the settlement negotiated by the President (*id.* at 2a). But, like the Claims Court, the court of appeals held that no taking without just compensation had occurred, because the President had "struck the bargain he determined would best accommodate all relevant interests" and "provided [petitioner] with some compensation for its claim, thus substituting a smaller certain sum for a larger contingent one" (*id.* at 2a, quoting *id.* at 21a).[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The lump sum recovery under the Executive Agreement with the People's Republic of China was consistent with the amount recovered under other settlement agreements entered into since World War II. Moreover, the President has provided for the resolution of claims of United States nationals against foreign governments on numerous occasions since 1799 (see *Dames & Moore,* 453 U.S. at 679-680 & n.8), and no court has ever entered a judgment requiring the United States to pay compensation to a claimant who was dissatisfied with the President's

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[1]In a separate concurring opinion, Judge Miller concluded that recovery in the Claims Court was barred because petitioner's claim is one "growing out of" or "dependent upon" a treaty within the meaning of 28 U.S.C. 1502 (Pet. App. 3a). The majority did not reach the question of the applicability of this jurisdictional bar because it concluded that petitioner's cause of action is without merit in any event (*ibid.*). Because we agree with the courts below that petitioner has no cause of action under the Just Compensation Clause, we likewise do not address this jurisdictional issue. Compare *Great Western Ins. Co.* v. *United States,* 112 U.S. 193 (1884), and *Eastern Extension Telegraph Co.* v. *United States,* 231 U.S. 326, 333 (1913), with *Dames & Moore,* 453 U.S. at 688-690.

action. The rejection by the courts below of petitioner's efforts to obtain such compensation therefore does not warrant review by this Court.

1. Petitioner's argument in this Court proceeds as if the President had repudiated petitioner's claim against the PRC. Thus, petitioner repeatedly asserts that there has been a "bartering away," "sacrifice," "cancellation" or "extinguishment" of its claim and the "complete destruction" of its property interests. See Pet. 9, 10, 11, 14, 15, 17, 18. That is not what happened. The President did not repudiate the claims of petitioner and other United States nationals against the PRC. The President *espoused* those claims: he used the Chinese assets that had been frozen in the United States as bargaining leverage, he took advantage of the favorable climate of the unfolding normalization of relations with the PRC, and he secured a total of $80.5 million from the PRC in satisfaction of the claims of United States nationals. Petitioner has received approximately $20 million of that amount, almost 25% of the total, as compared with the value of $54 million the Foreign Claims Settlement Commission placed on petitioner's assets that were seized by the PRC in 1950. That was scarcely a "complete destruction" of petitioner's claim against the PRC. It was, rather, a bona fide and entirely fair settlement of petitioner's claim in the circumstances presented, and it was in line with other settlement agreements entered into by the President since World War II.[2]

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[2]See 1984 FCSC Ann. Rep. (Table of Completed Programs). Most settlements since World War II resulted in the payment of less than 38% of the principal amount certified by the Foreign Claims Settlement Commission. The settlement agreement with the PRC resulted in recovery of 41% of the principal amount of the certified awards. In contrast, the recovery from the Soviet Union amounted to 10% of the certified claims. *Ibid.* In only one of the ten post-World War II settlement agreements discussed in the report did the United States recover sufficient funds to pay 100% of the certified claims.

As petitioner conceded below, and as the Claims Court found (Pet. App. 19a-20a), petitioner had no realistic prospect of recovering *any* amount from the PRC in the absence of intervention by the President. See pages 14-17, *infra*. Now that the President has advocated petitioner's claim and secured a substantial payment of $20 million to be distributed to petitioner, "justice and fairness"[3] plainly do not require that petitioner be compensated in an additional amount out of the Treasury of the United States for an obligation that was owed by the People's Republic of China for the expropriation of property situated in China. In essence, petitioner, which voluntarily engaged in commercial activity in China subject to the possibility that its property might be expropriated, is asking the public to insure its total investment in a foreign country against any loss arising ou of confiscatory actions taken by the foreign government.

We note as well that when the legislation authorizing the Foreign Claims Settlement Commission to determine the value of property expropriated by the PRC was under consideration by Congress in 1966, an official of the American & Foreign Power Co., which owned a majority interest in petitioner Shanghai Power Co., testified in support of the legislation in the House hearings. See *Claims of Nationals of the United States Against the Chinese Communist Regime: Hearing on S. 3675 Before the Subcomm. on the Far East & the Pacific of the House Comm. on Foreign Relations,* 89th Cong., 2d Sess. 14-20 (1966). The official testified that it had "proved impossible for the company to secure any legal relief in the courts of China against the seizure and, in fact, the company was never even accorded a hearing by the Communist Chinese authorities," and he further stated that "[t]he Chinese Communist regime has totally disregarded the proper international standards and

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[3]See *Penn Central,* 438 U.S. at 124.

has shown no interest whatever in providing the victims of its property confiscation with any opportunity for the submission of proof of their claims." *Id.* at 15. The witness urged passage of the bill so that the value of confiscated properties could be ascertained while evidence on that question was still available, and he acknowledged that this information in turn was intended to give the State Department as accurate a picture as possible "for use at a time when a negotiated settlement of the claims against the foreign government becomes feasible." *Id.* at 16. Finally, the witness stressed that it was "very clear" that the bill "[did] not contemplate the appropriation of funds for the payment of claims" and that "the claims program will not cost the United States other than the usual administrative expenses for the work of the Foreign Claims Settlement Commission." *Ibid.*

Thus, petitioner's parent corporation acknowledged in 1966 that it had no redress against the PRC absent intervention by the United States government. Petitioner's parent corporation also surely was aware in 1966 that negotiated settlements by the Executive with foreign governments typically resulted in the recovery of far less than the full value of the expropriated property. Indeed, the most prominent of those settlements—the Litvinov Assignment of 1933 that settled the claims of United States nationals against the Soviet Union (see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203 (1942))—had resulted in the payment of less than 10% of the claims.[4] Yet, far from objecting to a negotiated settlement by the Executive Branch, petitioner's parent corporation contemplated and sought to facilitate such a settlement by encouraging the enactment of a mechanism for the submission of claims against the PRC to the Commission. And it

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[4]See *Annual Report, supra* note 3, Index and Table of Completed Programs; Act of Aug. 9, 1955, ch. 645, 69 Stat. 562.

assured the Committee that the claims program, which petitioner subsequently invoked by submitting a claim to the Commission, would not impose any expense on the United States Treasury. This background highlights the absence of equity in petitioner's current claim to compensation from the United States because it is dissatisfied with the amount that it received pursuant to the settlement ultimately negotiated with the PRC.

2. There are, in any event, substantial analytical flaws in petitioner's argument.

a. First, petitioner concedes (Pet. 19) that the President has "unquestioned" authority to conclude a claims settlement agreement, such as that with the PRC. See also *Dames & Moore,* 453 U.S. at 675-688. This authority of the President stems in part from the obvious proposition—based both in practical reality and the theory of international law—that actions of a foreign government that injure an individual national of the United States also inflict an injury on the United States in its sovereign capacity. See, *e.g., Frelinghuysen* v. *Key,* 110 U.S. 63, 71-72 (1884). Compare *Heckman* v. *United States,* 224 U.S. 413, 437-442 (1912). The President's authority to settle the claims of the United States against a foreign government therefore necessarily subsumes the settlement of claims by United States nationals for any injuries they sustained.

The President does not actually represent individual claimants in a fiduciary capacity in the diplomatic settlement process. But whatever representation of the claimants' interests is afforded by the President as the "sole organ" of the Nation in the area of foreign affairs (*Dames & Moore,* 453 U.S. at 661, quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936)) is complete and does not depend on the acquiescence of the beneficiaries. See *Dames & Moore,* 453 U.S. at 679-680. Compare *Nevada* v. *United States,* 463 U.S. 110, 142 (1983), quoting

Heckman v. *United States,* 224 U.S. at 444-445. It is in the nature of the settlement process that the individual claimant must be bound by the agreement entered into by the President—at least in the absence of the most extreme circumstances, such as corruption or bad faith, of which there has been no suggestion here—just as a beneficiary in other settings is bound by the actions of a trustee or other person who is more directly charged by law with representing his interests. See *Nevada* v. *United States, supra.* This is so even though the President cannot act in the diplomatic process with exclusive regard for the interests of the individual claimant, because he also must protect the interests of the Nation as a whole. *Dames & Moore,* 453 U.S. at 680. Compare *Nevada* v. *United States,* 463 U.S. at 127-128, 142-143, 144 n.16. Cf. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 336-340 (1953); *Vaca* v. *Sipes,* 386 U.S. 171, 190-193 (1967).

This conceded and plenary authority of the President to settle claims on behalf of the Nation and individual claimants in a conclusive manner would be seriously undermined if a disgruntled claimant could collaterally attack the President's considered judgment simply by bringing an action in the courts of the United States to recover compensation for whatever additional amount the claimant believes the President should have obtained in the settlement. The result would be to require judicial second-guessing of the President's performance in diplomatic negotiations, without the benefit of the necessarily confidential information about the bargaining process, the positions of the debtor nation, and the myriad other considerations that might have informed the President's judgment.

Moreover, an individual's cause of action in such circumstances is one that essentially sounds not in taking, but in tort, based on allegations that the President failed to advance his interests adequately or fairly in the bargaining

process. Cf. *Ford Motor Co.* v. *Huffman, supra; Vaca* v. *Sipes, supra.* The President cannot be said to have "taken" the private claim in the sense in which the quoted term is commonly understood, because under international law—upon which petitioner relies for its contention that its claim against the PRC even amounts to a property right—the President had the authority from the outset to espouse and conclusively settle that very claim in his representational capacity on behalf of the United States, and thereby on behalf of the claimant as well. Allegedly inadequate advocacy of a claimant's interests in an overall bargaining process that looks to the normalization of relations is something quite different from the ordinary "taking" of a person's property.

b. There is another substantial analytical flaw in petitioner's argument. Petitioner contends that there was a taking to the extent that the President settled its claim against the PRC for less than its "full value" (Pet. i), by which petitioner means the amount certified by the Foreign Claims Settlement Commission (see Pet. 5), and it seeks to recover as compensation the difference between the two, a total of some $124 million. However, as the Claims Court pointed out (Pet. App. 11a-12a), the function of the Commission was to establish the value of petitioner's physical plant in China that was seized by the PRC. When the President entered into the Executive Agreement with the PRC in 1979, petitioner no longer owned the physical assets in China; instead, it owned a claim against the PRC for compensation for the PRC's expropriation of those assets (*id.* at 12a). It is that claim, not the physical assets themselves, that constitutes the property that allegedly was taken by the United States in this case.[5]

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[5]The value of the physical assets fixed by the Commission could not be dispositive even if the amount those assets were worth in 1950 were relevant to petitioner's just compensation claim against the United

The value of petitioner's claim against the PRC was, at most,

> the sum which, considering all the circumstances * * * probably could have been obtained for an assignment of the [claim for compensation] * * * that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy.

Brooks-Scanlon Corp. v. *United States,* 265 U.S. 106, 123-124 (1924). See also *United States* v. *50 Acres of Land,* No. 83-1170 (Dec. 4, 1984); *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 473-478 (1973). Had petitioner attempted in 1979 to sell its claim against the PRC, which had been dormant for nearly 30 years, it would have received nothing close to the value the Commission placed on petitioner's physical assets in China in 1950.

There were numerous obstacles to recovery by petitioner against the PRC. Compare *Dames & Moore,* 453 U.S. at 687. By 1979, any such claim may well have been barred by the statute of limitations. And if petitioner had attempted to bring suit against China within the statute of limitations, jurisdiction presumably would have been dependent upon petitioner's ability to locate and attach unencumbered assets of the Chinese government in the United States. But both in 1950, when petitioner's "claim" arose, and subsequent to the enactment of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.*, such assets were immune from prejudgment attachment. See, *e.g., Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354 (2d

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States. The value arrived at by the Commission was not subjected to adversarial testing by the PRC or by the United States with a view toward the possible liability of either for the amount ultimately fixed by the Commission. Pet. App. 11a-12a.

Cir. 1964), cert. denied, 381 U.S. 934 (1965); cf. *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica*, 676 F.2d 47, 49 (2d Cir. 1982).[6]

Moreover, even if petitioner had succeeded in establishing jurisdiction, the doctrine of sovereign immunity would have barred the suit. Prior to the enactment of the FSIA, foreign states enjoyed immunity from suit for their public acts, including the expropriation of private property for a public use. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983); *Rex* v. *Cia. Pervana de Vapores, S.A.*, 660 F.2d 61, 67-68 (3d Cir. 1981); *Victory Transport, Inc.* v. *Comisaria General*, 336 F.2d at 359-360.[7] A suit by petitioner against the PRC likewise would have been barred even after the enactment of the FSIA.[8] No doubt because it appreciated this obstacle, petitioner apparently never attempted to file such a suit. Compare *Dames & Moore*, *supra*.

Finally, even if petitioner had been able to obtain a judgment in its favor, that judgment would have been effectively unenforceable. Petitioner would have been unable to

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[6]The immunity from prejudgment attachment continued after the enactment of the FSIA because China did not make an explicit waiver of that immunity. See 28 U.S.C. 1609, 1610(d).

[7]The Executive also possessed authority to suggest immunity in appropriate cases, and the courts were bound by such suggestions. *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945).

[8]The FSIA recognizes a limited exception to the rule that foreign states are immune from claims based on the expropriation of property; that exception applies where the property is present in the United States in connection with a commercial activity conducted by the foreign state or the property is owned by an agency or instrumentality of the foreign state that is engaged in commercial activity in the United States. 28 U.S.C. 1605(a)(3). Petitioner could not satisfy the criteria for this exception because the property seized was not present in the United States or in the possession of a Chinese government instrumentality conducting a commercial activity in the United States.

execute against Chinese assets in the United States, absent waiver, because such assets were immune from seizure (Restatement (Second) of the Foreign Relations Law of the United States § 69, Reporter's Note 2 (1965)), and even after enactment of the Foreign Sovereign Immunities Act China's assets would have been immune from attachment for this purpose unless they were present in the United States in connection with a commercial activity. 28 U.S.C. 1610(a)(3). Moreover, all Chinese assets permanently in the United States had been frozen by the President. Those assets were subject to the President's plenary control (see *Dames & Moore,* 453 U.S. at 669-674), and he would have been under no obligation to make frozen assets available to petitioner to satisfy its judgment. See *Tran Qui Than* v. *Regan,* 658 F.2d 1296 (9th Cir. 1981), cert. denied, 459 U.S. 1069 (1982); *Sardino* v. *Federal Reserve Bank,* 361 F.2d 106 (2d Cir.), cert. denied, 385 U.S. 898 (1966); *Codray* v. *Brownell,* 207 F.2d 610 (D.C. Cir. 1953), cert. denied, 347 U.S. 903 (1954). In any event, there were insufficient assets of the Chinese Government in the United States to satisfy the full amount even of petitioner's claim alone, if that claim were measured by the value of $54 million the Foreign Claims Settlement Commission placed on petitioner's property, much less the full value of the claims of all United States nationals.[9]

In sum, if left to its own devices, petitioner faced virtually insuperable obstacles to recovering anything on its claim against the PRC. For this reason, the "value" of petitioner's private claim against the PRC, if measured by what a willing buyer would have paid for it prior to the President's settlement agreement with the PRC, was certainly far less

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[9]Of the approximately $80 million in blocked assets, only about $20 million were owned by the Chinese Government. The remainder belonged to various Chinese nationals.

than the $20 million petitioner ultimately recovered under that agreement—and may well have approached $0. Settlement of petitioner's claim for $20 million under such conditions cannot be regarded as a taking of property for which the Constitution requires the payment of compensation over and above that amount. Perhaps a prospective purchaser of the claim would have been willing to pay something in excess of the minimal or nonexistent value of the claim prior to the settlement with the PRC, based on speculation that the President might choose to espouse the claim and recover a more substantial amount. But petitioner had no *right* to have its claim espoused by the President; whether or not to do so was committed to the President's discretion. The value of the claim therefore should not be enhanced by the possibility prior to 1979 that the President might espouse it and obtain a substantial settlement. See, *e.g.*, *United States* v. *Fuller*, 409 U.S. 488, 491-494 (1973); *United States* v. *Rands*, 389 U.S. 121, 125 (1967).

It is true that the courts below assumed, without deciding, that petitioner's claim against the PRC was "worth" more than the amount it recovered under the settlement agreement. See Pet. App. 2a, 11a-12a. As we have explained, however, that assumption is utterly unrealistic, even though the courts below indulged in it for purposes of analysis. Because petitioner's ability to recover anything from the PRC was dependent almost entirely on a negotiated settlement, we cannot conceive on what basis a value in excess of the $20 million petitioner in fact realized as a result of the negotiated settlement could be assigned to the claim. In these circumstances, the substitution of one forum for another in pressing petitioner's claim—*i.e.*, the substitution of international negotiation, with the proceeds distributed on a pro rata basis through the Foreign Claims Settlement Commission, for whatever other forum petitioner in theory

might have had available—manifestly did not constitute a taking. Cf. *Dames & Moore,* 453 U.S. at 690 (Stevens, J., concurring in part).

c. Other factors bearing on the taking question also reinforce the conclusion that no taking of petitioner's property occurred as a result of the settlement with the PRC. As the Claims Court stated (Pet. App. 14a-15a (footnotes and citations omitted)):

> Factors relevant to whether there has been a taking are the degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those that it destroyed. In determining whether a taking has occurred the court must weigh all of the relevant factors and decide whether compensation is required by principles of justice and fair play.

Each of these factors weighs against finding a taking here.

In this case, petitioner received approximately 37% of the value of its property that was confiscated by the PRC in 1950. In other circumstances, this Court has sustained governmental action that resulted in a far greater diminution in the value of the property. See, *e.g., Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); Pet. App. 14a n.7. Moreover, in this case, petitioner was more than simply an "incidental" beneficiary of the overall normalization of relations, of which the claims settlement agreement was an

integral part. It realized the benefit of $20 million in payments, more than any other claimant received (Pet. App. 19a, 21a n.16).

The importance of the public interest served by the settlement agreement in this case also is manifest. The claim of an individual United States national against a foreign government is far different from the typical claim of one private person against another. As this Court has recognized, such claims not infrequently are "sources of friction" in the relations between two sovereign nations. *Dames & Moore,* 453 U.S. at 679, quoting *United States* v. *Pink,* 315 U.S. at 225. See Pet. App. 16a-18a. That friction, and the barrier to normalization of relations and commerce it causes, obviously affects the Nation as a whole and many of its citizens in addition to the particular claimant. This broader impact of one individual's claim on others and on the Nation's foreign relations substantially undermines the argument that a taking has occurred when the government has acted to eliminate that impact. See, *e.g., Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962); *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian, supra.*

Finally, the exercise of governmental power in this case fell well within traditional boundaries; it was not novel and unexpected. As this Court explained in *Dames & Moore,* consistent with established international practice and traditional international theory, the President has exercised the power to settle claims of United States nationals against foreign governments on numerous occasions throughout the Nation's history. 453 U.S. at 679-680. The potential that the President might exercise that established authority in the event of an expropriation by the Government of China thus was part of the context in which petitioner invested in China. The President's eventual invocation of that authority therefore did not interfere with any reasonable or

distinct "investment-backed expectations" of petitioner. *Penn Central,* 438 U.S. at 124. See Pet. App. 18a-19a, 22a-24a.

For all of the foregoing reasons, as the Claims Court concluded, the settlement of the claims of petitioner and other United States nationals against the PRC as part of the normalization of relations was "a classical adjustment of 'the benefits and burdens of economic life to promote the common good' " (Pet. App. 21a, quoting *Penn Central,* 438 U.S. at 124). Justice and fairness do not require the payment of compensation to petitioner over and above the $20 million it already has received.

3. Contrary to petitioner's assertion (Pet. 9-15), there is no conflict between the decision below and the decisions of this Court or other courts of appeals. In *Dames & Moore,* upon which petitioner relies (Pet. 13-14), this Court simply held that the Court of Claims (now the Claims Court) has jurisdiction under the Tucker Act, 28 U.S.C. 1491, to entertain a suit alleging that a taking occurred as a result of the suspension of claims against Iran. The Court expressly did *not* decide the merits of the argument that the suspension of those claims constituted a taking. See 453 U.S. at 688.[10]

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[10]Petitioner also relies (Pet. 9-10) on *Ware* v. *Hylton,* 3 U.S. (3 Dall.) 199 (1796), in which the Court upheld the validity of a treaty that required debtors to pay their British creditors even though they believed that they had discharged their debts by paying the government of Virginia. Petitioner quotes a statement by Justice Chase, writing for himself, in which he stated that compensation "ought" to be paid to the debtors. *Id.* at 245. This statement was dictum and, although the Just Compensation Clause was cited, the statement is best understood as reflecting a moral rather than legal principle. The circumstances of *Ware* also differ substantially from those in the instant case. The debtors apparently were under a reasonable belief that they had discharged their debts in full by payment of a sum certain to the State. In this case, by contrast, petitioner had a claim *against* a foreign government; that claim had not previously been discharged for a sum certain, and indeed its value, if any, was highly speculative.

Petitioner relies principally on the Court of Claims' decision in *Gray* v. *United States,* 21 Ct. Cl. 340 (1886), which, under a special Act of Congress referring the matter for an advisory opinion, considered claims against the United States for the extinguishment of private claims against France in an 1800 treaty. However, *Gray* involved unique circumstances: the court in *Gray* opined that a taking had occurred because the American claims were valid and would have been honored by France, but were nevertheless released in full by the United States. See *Aris Gloves, Inc.* v. *United States,* 420 F.2d 1386, 1396-1397 (Ct. Cl. 1970) (Nichols, J., concurring). In this case, by contrast, there was no indication that the claims of petitioner and others would have been honored by the PRC absent the settlement. Moreover, the claims against the PRC were not renounced or released in full by the United States, as in *Gray*; the Executive espoused the claims and received a substantial recovery, which in turn was paid to the claimants. Thus, even assuming that *Gray* lends some precedential support to the notion that the United States must pay compensation in the unique circumstances there presented, it does not support petitioner's argument here.

In any event, as the Court of Claims itself later observed with regard to its own prior decision in *Gray,* it was "strictly an advisory opinion [for Congress] which was not binding upon either of the parties and cannot be binding upon subsequent courts" (*Aris Gloves,* 420 F.2d at 1393). And indeed this Court has said of the payments made by Congress as a result of *Gray* that the "payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payment as of grace and not of right." *Blagge* v. *Balch,* 162 U.S. 439, 457 (1896). Accord, *United States* v. *The Schooner Peggy,* 5 U.S. (1 Cranch)

103, 110 (1801) ("it is not for the court, but for the government, to consider whether it be a case proper for compensation").[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1985

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[11]Similarly, two court of appeals decisions that cite *Gray* merely state in dicta that there may be situations in which the President's "cancellation" or "extinction" of private claims in a settlement might constitute a taking. See *American International Group,. Inc.* v. *Islamic Republic of Iran,* 657 F.2d 430, 446-447 (D.C. Cir. 1981); *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority,* 651 F.2d 800, 813 n.20, 814-815 (1st Cir. 1981). Those dicta do not describe the circumstances of this case, and in each instance, the court held that the taking claim was premature. In *Marschalk Co.* v. *Iran National Airlines Corp.,* 518 F. Supp. 69, 93 (S.D. N.Y. 1981), rev'd and remanded, 657 F.2d 3 (2d Cir. 1981), which also cites *Gray,* the district court did state that the settlement with Iran would require the payment of compensation. However, as the Second Circuit subsequently made clear, this aspect of the decision did not survive the decision in *Dames & Moore.* See 657 F.2d at 4. In *Meade* v. *United States,* 2 Ct. Cl. 224 (1866), aff'd, 76 U.S. (9 Wall.) 691 (1870), this Court expressly did not concur in the Court of Claims' finding that the United States was liable for a taking, concluding that the claim was barred because it had been dismissed by the treaty commissioner. See 76 U.S. (9 Wall.) at 700-701, 725. And in *E-Systems, Inc.* v. *United States,* 2 Cl. Ct. 271 (1983), the taking claim was found to be premature.

Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHANGHAI POWER COMPANY,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Petitioner raises the question, expressly reserved in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), whether the Government's extinguishment of its national's claim against a foreign government is a Fifth Amendment taking. The Government has advanced no valid ground for denying the petition for certiorari. It simply presumes, without support from any judicial precedent or scholarly authority, that the exercise of the claims settlement power is immune from the restraints of the Just Compensation Clause. The validity of that presumption, however, is ultimately for this Court to decide; the Government's restatement of its position is no justification for denying review of the constitutional issue.

The Government also attempts to obscure the taking issue by alleging that the claim of petitioner Shanghai Power Company

("SPC") is without value. This argument tacitly concedes the taking question raised in the petition but seeks to assure the Court that denial of the petition is appropriate because the Government has more than fully compensated SPC for the value of its claim. The Government's assertions concerning the question of just compensation are not only irrelevant to the taking issue but are also without any basis in the record. Both courts below assumed that SPC's claim was worth more than the payments SPC expects to receive under the Executive Agreement. Speculation as to the value of SPC's property affords no ground to avoid the taking question.

THE TAKING ISSUE

2. The Government's assertion (Opp. 8) that it did not effect a taking of SPC's claim because it did not "repudiate" the claim is faulty. The Executive Agreement extinguished all rights that SPC had in its claim, and thereby effected a taking of private property.[1] The Government's arrangement to distribute to SPC certain funds received pursuant to the Agreement cannot alter the fact of the taking, although it is an element in determining whether SPC has been fully compensated for the extinguishment. When the Government exercises its power of eminent domain to condemn property, the exercise is subject to judicial review to ensure that the property owner is justly compensated for the taking. Despite the Government's assertions of unfettered power over its citizens' international claims, it cannot explain why this class of property is not also entitled to Fifth Amendment protections.

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1. The Government's reliance (Opp. 9 & n.3, 18-20) on *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104 (1978), is erroneous. Nothing in *Penn Central*, a regulation of property case, contradicts the principle of law enunciated in *Armstrong v. United States*, 364 U.S. 40 (1960), that governmental action that destroys all rights in private property is a taking.

The Government maintains (Opp. 11-12) that SPC is bound by the Government's exercise of the claims settlement power because the Government acted as the representative of SPC's interests. Although the Government admits that it is not a fiduciary in law, it claims that its power as "sole organ" of foreign relations enables it, immune from constitutional restraint, to extinguish private claims except, perhaps, in the event of corruption or bad faith. This naked assertion that the Executive can do as it chooses with private property when it acts in the field of foreign relations is bereft of judicial or scholarly sanction, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), and the Government does not attempt to supply any. It is this Court that may determine whether the exercise of the claims settlement power is exempt from the Just Compensation Clause.

The Government's further suggestion (Opp. 12-13) that SPC's Fifth Amendment claim is nothing more than a common law tort action is merely a dubious attempt to evade the constitutional issue. SPC has never contended that the Government was under any duty to advance SPC's interests in prosecuting its claim. Consideration of paramount national interests, such as those involved in the normalization of relations with China, may demand the sacrifice of private claims against foreign governments. The protections afforded by the Just Compensation Clause, however, cannot be bargained away. Takings pursuant to claims settlements may indeed occur less frequently than takings pursuant to condemnation of real property, but the Government does not explain why only the latter should therefore be fully compensable.

3. The Government's argument (*see* Opp. 7-8) that SPC's taking claim is not worthy of review because there is no historical precedent for such a challenge to the exercise of the claims settlement power is also without merit. Prior to World War II, the Government traditionally obtained claims settlements that compensated claimants for all, or virtually all, of

their certified losses, despite the fact that, because of the doctrine of absolute sovereign immunity, private claimants had practically no recourse to judicial forums to enforce their claims. *See* Pet. 7. When no such compensation was obtained, the Court of Claims held that the Government's extinguishment of private claims was subject to the Fifth Amendment. *Gray v. United States*, 21 Ct. Cl. 340 (1886).[2] The Government's attempt to distinguish *Gray* (Opp. 21) is unpersuasive for, while foreign governments in the post-World War II era may be less willing to acknowledge their obligations to compensate private American claimants, the claimants have significantly greater ability, independent of the Government's diplomatic intervention, to enforce those obligations. This enhanced enforceability is primarily due to modern restrictions on sovereign immunity and expansion of judicial authority to enforce arbitration agreements and arbitral awards. SPC had no opportunity to take advantage of these favorable legal developments because Government regulations blocked SPC from enforcing its claim until after conclusion of the Executive Agreement.

Contrary to the Government's assertion (Opp. 20-22), U.S. courts have continued to recognize, most recently in the Iranian claims litigation, that the Government's extinguishment of claims could be a taking. *See* Pet. 11, 13-15. None of the Iranian claims cases reached a final determination on the taking question because, as this Court noted in *Dames & Moore v. Regan*, 453 U.S. at 688-89, that question would not be timely raised until the Iranian claimants, failing to obtain adequate compensation from the claims tribunal established under the Algiers Accords, bring their Fifth Amendment grievance to the Claims Court. SPC's claim is thus the first to timely raise the issue of the Just Compensation Clause's applicability to Government exercise of the claims settlement

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2. Congressional payments to the French Spoliation claimants in *Gray* were "as of grace" (*see* Opp. 21) because the Court of Claims did not have jurisdiction over the claims; this Court, however, noted *Gray*'s conclusion of constitutional law with no indication of disapproval. *Blagge v. Balch*, 162 U.S. 439, 455 (1896).

power; judicial and scholarly recognition of Fifth Amendment limitations on uninhibited exercise of that power, however, is neither novel nor recent. *See* Pet. 9-15. The Government's response of disparaging relevant precedent and pointing to its own recent post-World War II claims settlement practice simply does not address the constitutional issue.[3] If the Government's primary defense to the taking question is that it is currently exercising the claims settlement power in the belief that the Fifth Amendment is not applicable, the question is certain to recur.

4. The Government's elaborate speculation (Opp. 13-18) asserting the worthlessness of SPC's claim is both irrelevant and incorrect. This effort to sidestep the taking question ignores the conclusion of the courts below that the value of SPC's claim could not be resolved on a summary judgment motion. *See* Pet. 2a, 12a. Moreover, the Government's assumptions concerning valuation are erroneous. Its assertion (Opp. 12) that SPC seeks to or must "second-guess" the Government and inquire into the circumstances and motivations of foreign policymaking in order to establish the worth of its claim is one such phantom. The worth of SPC's claim is not dependent on proof that the Government could have obtained more for extinguishing the claim. The valuation of the Government's own commission is probative of the claim's worth, as is the enforceability of SPC's claim independent of Government diplomatic intervention.

The Government's argument that SPC could not have enforced its claim is also unfounded. Having for three decades maintained blocking regulations prohibiting SPC from at-

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3. The Government erroneously cites (Opp. 8 n.2, 10) the Litvinov Assignment to demonstrate an historical pattern of claims settlement agreements extinguishing claims for which the eventual compensation paid was far less than the claims' value. The Litvinov Assignment did not extinguish any private American claims against the Soviet Union. *See* H.R. Rep. No. 624, 84th Cong., 1st Sess. 3 (1955), *reprinted in* [1955] U.S. Code Cong. & Ad. News 2745, 2747.

tempting to enforce its claim, the Government erroneously suggests (Opp. 14) that the claim's lack of enforceability is demonstrated by the fact that SPC did not undertake such enforcement. Furthermore, the Government's catalogue of obstacles to enforceability of claims against foreign governments (Opp. 14-16) ignores the circumstances of SPC's claim. In particular, it ignores the fact that the franchise agreement under which SPC operated in China contained a provision prohibiting expropriation and provided for disputes to be remedied through arbitration under the United States Arbitration Act, 9 U.S.C. §§ 1-14. The agreement to arbitrate constituted a waiver of sovereign immunity. 28 U.S.C. § 1605(a)(1); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In addition, the Government's non-recognition of the People's Republic of China until 1979 would have precluded China from successfully asserting either sovereign immunity or the act of state doctrine. *Restatement (Second) of Foreign Relations Law of the United States* §§ 42(a), 107, Comment d (1965).

5. SPC's petition raises the question whether the Government's exercise of its power to extinguish private American claims against foreign states is a taking under the Fifth Amendment. There is no dispute concerning the importance of this question—the Government merely contends that the courts below acted correctly in excepting such Government extinguishments of property from the protection of the Just Compensation Clause. SPC submits, however, that there is no basis in precedent or policy for such an exception.

The Just Compensation Clause properly stands as a guardian of all private property, and it has not previously been suggested that the clause should not protect Americans' claims against foreign states. If in the pursuit of its foreign policy goals this nation chooses to eliminate certain citizens' private claims for less than their fair value, then the nation should assume its traditional Fifth Amendment obligation to justly compensate those citizens.

While the courts below have denied any obligation by the Government to compensate holders of extinguished private claims, the Government seems able to justify that denial only by reference to considerations of expediency. However, expediency is not the policy behind the Just Compensation Clause. Rather, that policy is fairness to all citizens, and such a policy will only be furthered by the application of the Fifth Amendment to this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully prayed that this Court issue a writ of certiorari to review the judgment of the Court of Appeals.

Dated: September 27, 1985

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